TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966

No. 480

WARDEN, MARYLAND PENITENTIARY,
PETITIONER,

vs.

BENNIE JOE HAYDEN.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED AUGUST 25, 1966

CERTIORARI GRANTED NOVEMBER 7, 1966.

SUPREME COURT OF THE UNITED STATES

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., JANUARY 9, 1967

[fol. 4]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
BALTIMORE 2, MARYLAND

No. 14388

Civil Action

BENNIE JOE HAYDEN, Prison No. 7529, Petitioner,

vs.

VERNON L. PEPERSACK, Warden, Maryland Penitentiary, Respondent.

The Honorable Thomas B. Finan, Esquire, Respondent's Counsel, Attorney General of the State of Maryland.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS—Filed February 4, 1963

To the Honorable Roszel C. Thomsen, U. S. District Chief Judge.

Application for leave to file a petition for Writ of Habeas Corpus In Forma Pauperis, pursuant to title 28 U.S.C.A. Section 1915 Adkins v. DuPont Co., 335 U.S. 331 in the Honorable Clerks office.

Petitioner alleges that he is a poor person and is unable to pay cost of the proceedings or to hire an attorney to represent him on Habeas Corpus.

Petitioner alleges that the Criminal Court of Baltimore City, has prohibited him from exhausting his State remedies, by neglecting, refusing or failing to intertian your petitioner's application for relief under the uniform post conviction produce act, which has been in the custody of

Criminal Court of Baltimore City for over 167 days in violation of the due process and equal protection of law clauses to the fourteenth (14) amendment United States Constitution.

[fol. 5] Petitioner advances his allegations in this Honorable Court as presented in Criminal Court of Baltimore City.

The jurisdiction of this Honorable Court is invoked under title 28 U.S.C.A. 2241 and 28 U.S.C.A. section 2254 petitioner Bennie Hayden, prays this Honorable Court to issue a Writ of Habeas Corpus to hold a hearing on his allegations, that his conviction for robery with a deadly weapon, was obtianed in violation of the (fourth (4th) (fifth 5th) (Six 6th) and fourteenth amendments of the United States Constitution and the Supreme Court decision in Mapp v. Ohio 367 US 643 81 Ct 1684 6L. Ed. 2d 1081 (1961).

Introduction Argument

A. That judgment, conviction, and sentence of fourteen years are

1. In violation of the United States Constitution.

2. In violation of the Constitution and laws of the State of Maryland.

3. The Court was without jurisdiction to impose the sentence.

4. The State Court ignored the Supreme Court decision in Mapp v. Ohio.

5. That your petitioner has been denied his rights guaranteed by the United States Constitution.

6. That your petitioner is innocent of false charges of robery with deadly weapon, as made by the State of Maryland.

[fol. 6] It is respectfully submitted for the above federal and State violations, your petitioner alleges that he should be released from his illegal and unlawful confinement in the Maryland penitentiary at once and petitioner prays as in duty bound Ect. Petitioner alleges that he was arrested without an arrest warrant, nor did the police officers have a search and seizure warrant, nor did the police officers show a search & seizure warrant when your petitioner's wife opened the door of their home and asked police officers what did they want, after they 'the police' inquired is to was there a man in the house, petitioner's wife inquired if they 'the police' had a search and seizure warrant. And these police officers came into your petitioners home and went up to the second floor and searched his home and found two guns, sweater, cap, and a uniform which was used by the state to convict your petitioner on illegally seized evidence in violation of the fourth (4th) amendment United States Constitution.

A. The fourth amendment United States Constitution provides:

The right of the people to be secure in their persons, house's, paper's, and effects agianst unreasonable searche's and seizure's shall not be violated, and no warrants shall be issued but upon probable cause supported by oath or affirmation and particulary describing the place to be searched and the persons and things to be seized.

[fol. 7] The amendment applies to arrest of persons, searche's of persons and their dwellings ! Mapp v. Ohio 367 US 643 81 Ct 1684 6 L Ed 2d 1081 (1961) held that evidence obtianed in violation of the fourth amendment privileges is not addmissable in a State Court prosecution.

Federal & State Cooperation in the sulution of crime under constitutional standards will be promoted, if only by regulation of their now mutual obligation to respect the same fundamental certeria in their approaches.

Henry vs. US 36, 1 U.S. 98. 100-101, 80 S. Ct 168, 170, 4 L Ed. 2d 134 (1959).

Boyd vs. U.S. 116 U.S. 616, 6 S. Ct 524 (1886) and Mapp v. Ohio, both held that the fourth and fifth amendments to the United States Constitution are entimately related and that a violation of the fourth amendment almost of necessity imperils the citizens rights under the fifth amendment.

The double standard will be prevented only if the federal and state rules of law sorounding the fourth amendment are indentical. Applying Mapp v. Ohio, regarding standing to assert the fourth amendment privileges and applied the federal rule of Jones v. U.S. 362 U.S. 257, 80 S Ct 725, 4 L Ed 697 (1960).

[fol. 8] Under the fourth amendment a search cannot be made without a warrant except as an incident to a unlawful arrest, probable cause, absent a warrant dose not justify a search unless exceptinal circumstances exist Agnello v. US 20, 46. S. Ct 4, 70 L. Ed 145 (1925) Johnson v. U.S. 333 U.S. 10, 68 S. Ct 367, 92 L, Ed 436 (1948) Chapman v. U.S. 365, U.S. 610, 81 S. Ct, 776, 5 L Ed 2d, 828 (1961) See US v. Block, 202, F Supp. 705, 707, S. D. N. Y. (1962) a recent case which which sums up this line of supreme court cases as follows:

Absent exceptional circumstances, a search not in connection with unlawful arrest may not be made without a warrant. Another exception to the general rule is that a person may waive his rights to the fourth amendment privileges by consententing voluntary (as opposed to submission to lawful authority) to a search or seizure. Johnson v. US Supra. The search in this present case was not an incident to a unlawful arrest. The arrest took place after the unlawful search of your petitioner's home (as officers testified at the trial) without seeing your petitioner comitting a crime, but only on hearsay of another person, who gave false and perjured testimony at the trial with

the knowledge and apporval of the states attorney that illegally seized evidence was presented by the States attorney and police officers, mainly in the form of hearsay, which resulted in your petitioner's false indictment of charges of robery with a deadly weapon.

[fol. 9] Your petitioner alleges that the invasion of his home and the subsequent search without warrant constituted a deprivation of his rights privileges or immunities guaranteed by the constitution of the United States. Therefor your petitioner alleges that he should be released from his illegal and unlawful confinement in the Maryland penitentiary at once.

Your petitioner's wife testified in the precense of the Honorable Micheal J. Manley that she was threatened when she asked police not to search without a warrant.

That Charles McGuirk, alleged victum failed to identify your petitioner as the person who robed him, yet the state convicted your petitioner on false and hearsay testimony of John Falls and James O. Waters. Petitioner alleges and adduces that he is innocent of false charges of robery with deadly weapon are any alleged charges as presented by the State of Maryland.

Respectfully submitted in his proper persons

Bennie Joe Hayden #7529, 954 Forest Street, Baltimore 2, Maryland.

[fol. 11]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. 14388

BENNIE JOE HAYDEN

v.

VERNON L. PEPERSACK, Warden, Maryland Penitentiary.

Thomsen, Chief Judge

MEMORANDUM OPINION AND ORDER—February 4, 1963

Petitioner was convicted in the Criminal Court of Baltimore City of robbery with a deadly weapon (indictment #1259/62) and was sentenced by Judge Manley to fourteen years' in the Maryland Penitentiary from March 17, 1962. No appeal was taken from the conviction.

On August 8, 1962, petitioner filed in the Criminal Court of Baltimore City a motion to strike the conviction and sentence, which was denied by Judge Manley on November 14, 1962. Appeal therefrom was dismissed on January 16, 1963, on motion of the petitioner.

There is now pending in the Criminal Court of Baltimore City an amended petition under the Uniform Post Conviction Procedure Act, which had been originally filed on August 14, 1962.

Since it is apparent that petitioner has not exhausted his state remedies, his petition for habeas corpus filed herein must be and it is hereby denied.

Leave to file in forma pauperis is hereby granted.

The Clerk is instructed to send a copy of this memorandum opinion and order to the petitioner.

Roszel C. Thomsen, Chief Judge, U.S. District Court.

[fol. 42]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[Title omitted]

MEMORANDUM AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS—September 10, 1963

Petitioner's first petition for a writ of habeas corpus was denied by Judge Thomsen on February 4, 1963, on the ground that petitioner had not exhausted his then available state remedies. At the time of Judge Thomsen's order a petition under the Uniform Post Conviction Procedure Act was pending before the Criminal Court of Baltimore.

Petitioner has now filed a second petition for the issuance of a writ of habeas corpus, substantially in the same form as the one denied by Judge Thomsen. In his second petition, petitioner suggested that he had been denied post conviction relief by the Criminal Court of Baltimore, but that an application for leave to appeal was pending in the Court of Appeals of Maryland. Inquiry of the Clerk of the Court of Appeals of Maryland confirms that an application for leave to appeal has been made and is as yet undetermined.

Under these circumstances, the second petition for a writ of habeas corpus is also premature, and for that reason it will be denied.

[fol. 43] It is, therefore, this tenth day of September, 1963, by the United States District Court for the District of Maryland,

Ordered, that petitioner's petition for a writ of habeas corpus be, and it is hereby, denied; leave to file in forma pauperis is hereby granted; and the Clerk is directed to mail a copy of this Memorandum and Order to petitioner.

Harrison L. Winter, United States District Judge.

[fol. 44]

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Persons in State Custody

Case No. 14388—Civil
(To be supplied by the Clerk of the District Court)

BENNIE JOE HAYDEN
Full name and prison number (if any) of Petitioner

vs.

WARDEN, MARYLAND PENITENTIARY.
Name of Respondent

PETITION FOR WRIT OF HABEAS CORPUS—Filed July 22, 1964

Instructions—Read Carefully

In order for this petition to receive consideration by the District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on the reverse side of the page or on an additional page. Petitioner shall make it clear to which question any such continued answer refers.

Since every petition for habeas corpus must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should, therefore, exercise care to assure that all answers are true and correct.

If the petition is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that petitioner will be

unable to pay the fees and costs of the habeas corpus proceedings. When the petition is completed, *the original and one copy* shall be mailed to the Clerk of the District Court for the District of Maryland.

[fol. 45] 1. Place of detention Maryland Penitentiary

2. Name and location of court which imposed sentence Criminal Court of Balt., City Balt., Maryland

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

(a) 1259 robbery with deadly weapon

(b) 1260, concealing a deadly weapon

(c) .....

4. The date upon which sentence was imposed and the terms of the sentence:

(a) June 8, 1962 14 years to the Maryland Penitentiary

(b) .....

(c) .....

5. Check whether a finding of guilty was made

(a) after a plea of guilty .....

(b) after a plea of not guilty √

(c) after a plea of nolo contendere .....

6. If you were found guilty after a plea of not guilty, check whether that finding was made by

(a) a jury .....

(b) a judge without a jury √

[fol. 46] 7. Did you appeal from the judgment of conviction or the imposition of sentence? .....

8. If you answered "yes" to (7), list

(a) the name of each court to which you appealed:

i. .....

ii. .....

iii. .....

(b) the result in each such court to which you appealed:

i. .....

ii. .....

iii. .....

(c) the date of each such result:

i. .....

ii. .....

iii. .....

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. .....

ii. .....

iii. .....

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) It was my first time being in the Criminal Court and I didn't know anything to do about being convicted, if I had known anything about an

(b) .....

appeal I would not have known what to raise, because I was first acquainted with the past conviction by other inmates at the penitentiary, and

(c) .....

the help of my classification officer.

[fol. 47] 10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Arrested without warrant, and the police seized several articles from a search that ranged over my entire home, the articles they took were 2 guns, a sweater, cap, shells, bullets telegrams, and a uniform, all of the evidence was obtained from a search without warrant or consent.

(b) Prosecuting witness did not identifie me as the person that robed him

(c) The grand jury of Balt. City issued a indictment against me based on hearsay information

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) The search-arrest, trial conviction, was subsequent to Supreme Courts decision in Mapp v Ohio (evidence obtianed in violation of fourth amendment privilege inaddmissabel in a State Court prosecution. The police acted on hearsay to search and there was no warrant or consent, and the search consisted of exploring my entire home.

(b) The prosecuting witness did not identifie me as the person that robed him. Neither did anyone testifie that I was at the sence of the crime only that I was seen running 70 feet from the sence of the crime according to the State witnesses.

(c) The indictment is null & void because the charges set forth in it were not supported by the State witnesses.

The indictment charges robery with deadly weapon and the prosecution did not place me at the sence of the crime, they only produced two witnesses who saw me running and received information

from another person that a robery had been comitted and they testified to what they heard someone say in Court.

[fol. 48] A review of the trial transcript of fact will show that the police did act on hearsay information to arrest me and search my home and if the illegally seized evidence had not been addmitted I would not have been convicted, without the evidence all the State could show is that a man was seen running 70 feet from the sence of the alleged crime and this can not be used to convict a person because according to the testimony of state witnesses there were a bunch of men there and anyone of them could have robed this man and the prosecuting witnesses testified that he is not sure who took the money out of his pocket only that it was gone after the man left. Running only creates suspicion and suspicion is not grounds for an arrest without a warrant, and even if there were probable cause to arrest this still would not create a probable cause for an exploratory search.

[fol. 49] 12. Prior to this petition have you filed with respect to this conviction

(a) any petition in a State court under the Maryland Post-Conviction Procedure Act, Md. Code of Public General Laws, Art. 27, §§ 645A-645J? √

(b) any petitions in State or Federal courts for habeas corpus? √

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other court? √

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application

(a) the specific nature thereof:

i. Motion to Strike Conviction & sentence

ii. Past Conviction

iii. 2 Federal Habeas Corpus's

iv. 3 State Habeas Corpus's

(b) the name and location of the court in which each was filed:

i. Criminal Court of Balt. City

ii. Criminal Court of Balt. City

iii. U S District Court

iv. Circuit Court For Prince Georges Co, Circuit Court For Washington Co.

(c) the disposition thereof:

i. Denied—appeal denied

ii. Denied—appeal granted—redenial on March 19, 1964

iii. Denied not exhausted State remedies

iv. Denied on March 19's decision

(d) the date of each such disposition:

i. Nov 14, 1962 appeal denied Jan 13, 1963

ii. May 16, 1963 appeal granted Dec 12, 1963 redenial March 19, 1964

iii. Feb 13, 1964 August 1963

iv. May 13, 1964 June 11, 1964 June 25, 1964

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. Edward v Warden Davis v Warden
Both citations are from the Court of Appeals

ii. .....

iii. .....

iv. .....

[fol. 50] 14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? .....

15. If you answered "yes" to (14), identify

(a) which grounds have been previously presented:

i. illegal arrest, illegal search & seizure

ii. No identification by prosecuting witnesses

iii. being indicted on hearsay

(b) the proceedings in which each ground was raised:

i. Past Conviction Proceeding—Motion to Strike

ii. 3 Petitions for State Habeas Corpus

iii. 2 Petitions for Federal Habeas Corpus

16. If any ground set forth in (10) has not previously been presented to any court, state or federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

(a) .....

(b) .....

(c) .....

[fol. 51] 17. Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? yes

(b) your trial, if any? yes

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? .....

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? post conviction

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

i. Michael Freedman Trial Counsel
1711 Court Square Building Balt. 2

ii. Samuel M Campanaro post conviction
608 Munsey Building

iii. .....

(b) the proceedings at which each such attorney represented you:

i. Trial

ii. Post Conviction

iii. .....

[fol. 52] 19. If you are seeking leave to proceed *in forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 1, of this form)? .....

Bennie Joe Hayden
Signature of Petitioner

Duly sworn to by Bennie Joe Hayden, jurat omitted in printing.

[fol. 56]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[Title omitted]

ORDER TO SHOW CAUSE—Filed July 22, 1964

Upon the petition for a writ of habeas corpus filed herein, it is Ordered this 22nd day of July 1964, by the United States District Court for the District of Maryland, that the respondent show cause, if any he (they) may have, on or before the 14th day of August, 1964, why a writ of habeas corpus should not be issued as prayed; it appearing to the Court that more than three days to show cause is required.

Leave to file in forma pauperis is hereby granted.

The Clerk is instructed to mail a copy of the petition and a copy of this Order to the Attorney General of the State of Maryland and to mail a copy of this Order to the petitioner.

Roszel C. Thomsen, Chief Judge, U. S. District Court.

[fol. 57]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[Title omitted]

ANSWER TO ORDER TO SHOW CAUSE—Filed August 14, 1964

Respondent, Franklin K. Brough, Warden, Maryland Penitentiary, by Thomas B. Finan, Attorney General, and Franklin Goldstein, Assistant Attorney General, his attorneys, answering the Petition for Writ of Habeas Corpus filed herein and showing cause why the same should not be granted, respectfully represents unto Your Honor:

1. On May 21, 1962, Petitioner, represented by an experienced criminal attorney, submitted to trial before Judge Michael J. Manley in the Criminal Court of Baltimore City sitting without a jury, under plea of not guilty to a charge of robbery with a deadly weapon.

2. The trial was not concluded on the first day and was resumed on May 22, 1962 and again on May 28, 1962, on which date Petitioner was found guilty by Judge Manley and sentence was deferred pending filing of a Motion for a New Trial.

3. No Motion for a New Trial was filed, and on June 8, 1962 Petitioner was sentenced by Judge Manley to 14 years in the Maryland Penitentiary from March 17, 1962.

4. On June 26, 1962 the Petitioner filed a Petition under the Post Conviction Procedure Act.

5. Subsequent to the filing of the Petition under the Post Conviction Procedure Act, the Petitioner filed a Mo-
[fol. 58] tion to Strike the Conviction and Sentence on August 8, 1962 and the said Motion was denied on November 14, 1962. Petitioner took an Appeal to the Court of Appeals of Maryland from the denial of the Motion to Strike Conviction and Sentence, which Appeal was dismissed on January 17, 1963.

6. On April 23, 1963, an experienced attorney was appointed to represent Petitioner in his Petition under the Post Conviction Procedure Act and on May 24, 1963, after a hearing, Judge Anselm Sodaro in the Criminal Court of Baltimore dismissed the Petition. A copy of the Order denying relief and dismissing Petition of Judge Sodaro is attached, made part hereof and marked Exhibit A.

7. On June 5, 1963 Petitioner filed an Application for Leave to Appeal from the Order of Judge Sodaro. On December 12, 1963 the Application for Leave to Appeal was granted and the case was remanded to the Criminal Court of Baltimore for further proceedings to determine

whether "in fact there had been an illegal search and seizure and a consequent arrest without a warrant." *Hayden* v. *Warden*, 233 Md. 613 (1963), 195 A. 2d 692.

8. As a result of the decision of the Court of Appeals an additional hearing was held before Judge Sodaro in the Criminal Court of Baltimore on March 19, 1964, at which Petitioner was represented by his court-appointed counsel and the Court considered all the facts as to whether or not there had been an illegal arrest and/or an illegal search or seizure. The Petitioner was present at this hearing and testified, and the State introduced testimony with regard to the probable cause of the arresting officer to believe that a felony had been committed and that Petitioner had committed the felony. On March 19, 1964 Judge Sodaro filed an Order denying relief and dismissing Petition, in which he set forth the specific findings of fact with regard to the arrest and search and seizure and as a result of his findings of fact, determined that the arrest was legal and that, therefore, the search incident to the arrest was legal. [fol. 59] A copy of the March 19, 1964 Order of Judge Sodaro is attached hereto, made part hereof and marked Exhibit B. On March 24, 1964 Petitioner filed an Application for Leave to Appeal from the March 19, 1964 Order of Judge Sodaro.

9. On April 25, 1964 Petitioner sent a letter to the Clerk of the Court of Appeals of Maryland requesting the withdrawal of the Application for Leave to Appeal. A copy of said letter is attached hereto, made part hereof and marked Exhibit C. On April 29, 1964 the Chief Deputy Clerk of the Court of Appeals of Maryland wrote to the Petitioner and informed him that in accordance with his instructions, the Application for Leave to Appeal had been withdrawn. A copy of said letter is attached hereto, made part hereof and marked Exhibit D.

10. Subsequent to the withdrawal of the Application for Leave to Appeal from the March 19, 1964 Order of Judge

Sodaro, the Petitioner filed with the Circuit Court for Washington County an Application for Issuance of a Writ of Habeas Corpus which was denied on May 13, 1964 in a Memorandum Opinion of Judge D. K. McLaughlin, which is attached hereto, made part hereof and marked Exhibit E. He then filed an additional Application for the Issuance of a Writ of Habeas Corpus with the Circuit Court for Prince George's County which was denied on June 11, 1964 in an Opinion and Order of Court of Judge William P. Bowie, a copy of which is attached hereto, made part hereof and marked Exhibit F. Finally he filed a second Application for Issuance of a Writ of Habeas Corpus in the Circuit Court for Prince George's County which was denied in an Opinion and Order of Court of Judge William P. Bowie on June 29, 1964, a copy of which is attached hereto, made part hereof and marked Exhibit G.

11. While Petitioner was seeking State remedies in the above described manner, he also filed two Petitions for a Writ of Habeas Corpus in the United States District Court for the District of Maryland. One Petition was denied by Judge Roszel C. Thomsen on February 4, 1963 for failure to exhaust then available State remedies and the second Petition was denied by Judge Harrison L. Winter on Sep- [fol. 60] tember 10, 1963, also for failure to exhaust then available State remedies.

12. Petitioner's basic contentions are the following:

(a) That the arrest was illegal and that, therefore, the search and seizure incident to the arrest were also illegal. (As part of this contention Petitioner appears to argue that since the arresting officer acted on information received over his police radio and from a cab driver who had seen Petitioner leave the premises where the hold-up had taken place and run into a dwelling, the arrest was based on "hearsay.")

(b) That the prosecuting witness did not identify him and that no one places him at the scene of the crime.

(c) That the Grand Jury of Baltimore had issued an indictment based on "hearsay information." (Here again the Petitioner seems to argue that the fact that certain witnesses did not see him commit the crime but saw him running from the scene of the crime in some way makes their testimony hearsay.)

13. Petitioner alleges that he did not take a direct appeal because he was unacquainted with criminal procedures. This statement by Petitioner would appear to prevent a contention that Petitioner knowingly and intentionally waived his right to appeal. However, after once utilizing the Post Conviction Procedure Act and obtaining a result whereby his case was remanded for a further hearing under the Post Conviction Procedure Act, Petitioner again applied for leave to appeal and then by his own letter, which is Exhibit C, requested withdrawal of the Application for Leave to Appeal. Exhibit C speaks for itself and the Respondent contends that this was a knowing and intentional waiver of a State remedy which was available to him and that, therefore, Petitioner is precluded from making these contentions in this proceeding.

14. Even if this Court does not find Petitioner knowingly and intentionally failed to exhaust all State remedies avail- [fol. 61] able to him, it appears that there is no factual basis for the Petitioner to claim that any of his constitutional rights were violated. Petitioner's second and third contentions were disposed of by the first opinion of Judge Sodaro and by the decision of the Court of Appeals on the Application for Leave to Appeal. It is readily apparent that both of these contentions go only to the weight of the evidence and, therefore, are not available in a Petition for Writ of Habeas Corpus in the Federal Court.

15. Petitioner's first contention was the basis for the remand by the Court of Appeals of Maryland for a factual determination as to whether or not there had been any illegal arrest which would make the search and seizure

incident to the arrest also illegal. Judge Sodaro clearly set forth the testimony presented in the hearing before him at which Petitioner was represented by counsel and testified himself. Judge Sodaro found that the arrest was legal and that, therefore, the search and seizure incident to the arrest were also legal. Judge Sodaro's conclusions of law from his findings of fact are completely justified under present Maryland law. There can be no doubt that Officer Parrish had reasonable cause to believe that a felony had been committed and that Petitioner had committed it and that the Petitioner was present in the dwelling, 2111 Koko Lane. This gave the officer the right while in the course of "hot pursuit", to go to the door of the residence as he did, request admittance and arrest Petitioner without a warrant. See *Brinegar* v. *United States,* 338 U.S. 160, 179, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949); *Reeves* v. *Warden,* 226 F. Supp. 953, 957 (D. Md. 1964); *Mulcahy* v. *State,* 221 Md. 413, 421, 158 A. 2d 80 (1960). After the arrest of the Petitioner the officer had the right as an incident of the arrest, to search the Petitioner and his surroundings. See *Hitt* v. *State,* Court of Appeals of Maryland, No. 420, September Term 1963 (July 8, 1964); *Farrow* v. *State,* 233 Md. 526, 197 A. 2d 434 (1964). See also *Ralph* [fol. 62] v. *Pepersack,* United States Court of Appeals for the Fourth Circuit, No. 9176 (July 16, 1964). In the case of *Ker* v. *California,* 374 U. S. 23, 10 L. Ed. 2d 726, 83 S. Ct. 1623 (1963), it is stated at 10 L. Ed. 2d at 738 that:

> "The States are not to be precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures . . . "

The well established doctrine of the Maryland Courts (and, indeed, the Federal Courts) that arrest may be made

without a warrant where the arresting officer has reasonable cause to believe that a felony has been committed and that the defendant is the one who has committed the felony, was properly applied by Judge Sodaro in this case and, therefore, this Honorable Court should dismiss the within Petition.

Petitioner has filed with this Honorable Court a copy of the trial transcript which Petitioner apparently procured from the Court Reporter himself. The Respondent does not have, nor did Respondent ever have a copy of the trial transcript. The Respondent has examined the file of the Criminal Court of Baltimore in connection with the Application for Relief under the Post Conviction Procedure Act and has determined that Petitioner's transcript of the trial was submitted to Judge Sodaro, and was available to Judge Sodaro at the time of the post conviction hearing. The Respondent contends that the transcript of the trial supports the findings of fact made by Judge Sodaro in his Order of March 19, 1964.

16. Respondent specifically denies and traverses each and every one of the allegations contained in the Petition.

Wherefore, the Petitioner is not illegally imprisoned, detained or restrained of his liberty by Respondent and Respondent, having fully answered the Petition for Writ [fol. 63] of Habeas Corpus filed herein, and having shown cause why the same should not be granted, requests that the Petition be dismissed.

Thomas B. Finan, Attorney General, Franklin Goldstein, Assistant Attorney General, 1200 One Charles Center, Baltimore, Maryland 21201, 539-5413, Attorneys for Respondent.

Certificate of Service (omitted in printing).

[fol. 64]

EXHIBIT A TO ANSWER

IN THE CRIMINAL COURT

OF

BALTIMORE

Indictment #1259/1962

Post Conviction #452

IN THE MATTER OF

BENNIE JOE HAYDEN

VS.

WARDEN, MARYLAND PENITENTIARY.

Hearing under the Uniform Post Conviction Procedure Act

ORDER DENYING RELIEF AND DISMISSING PETITION—
May 24, 1963

The Petitioner has filed a petition under the Uniform Post Conviction Procedure Act, was represented by an attorney appointed by the Court and was present at a hearing before me on May 16, 1963.

On May 28, 1962, the Petitioner was found Guilty generally on an Indictment charging Robbery with Deadly Weapon, (nolle Prosequi being entered by the State as to the Seventh Count of said indictment) by Judge Michael J. Manley, sitting without a jury, after first having entered a plea of Not Guilty. He was sentenced to the Maryland Penitentiary for a term of fourteen years, dating from March 17, 1962.

In his amended Petition the Petitioner contends:

1. Illegal search and seizure.
2. No positive identification.
3. Nolle Prosequi of one count by the State is proof of innocence.
4. Denial of speedy trial.

All of these contentions are without merit.

As to the first contention, illegal search and seizure—questions of the legality of search and seizure relating to the admissibility of evidence obtained by an allegedly illegal search and seizure should have been raised at the trial, and are not grounds for relief under the Act. (Ward v. Warden, 222 Md. 595, certiorari denied 80 S.Ct. 1254; Rice v. Warden, 221 Md. 145; Nears v. Warden, 220 Md. 682; Banks v. Warden, 220 Md. 652.

[fol. 65] 2. No positive identification—this question could have been reviewed on a Motion for a New Trial or an Appeal to the Court of Appeals of Maryland, neither of which was taken, and the Act is not a substitute for a Motion for a New Trial or for an Appeal. (Turner v. Warden, 220 Md. 683; McClain v. Warden, 220 Md. 666.) This question relates to weight and sufficiency of evidence and is not a matter to be raised under the Act. (Scott v. Warden, 222 Md. 596; Galloway v. Warden, 221, Md. 611).

3. Nolle Prosequi of one count in an indictment reflects the Petitioner's innocence of other counts—This deals with the weight and sufficiency of the evidence as to one of the counts charged and is again a question that could have and should have been properly raised on a Motion for a New Trial, or an Appeal, and neither remedy was sought by the Petitioner, therefore he is not entitled to have this question reviewed under the Act. (Scott v. Warden, 222 Md. 596; Doris v. Warden, 222 Md. 586; Galloway v. Warden, 221 Md. 611; Wilson v. Warden, 222 Md. 580.)

The State has the right to nol pros one or more counts in an indictment if it appears that the Defendant was improperly charged in that count or if the evidence available to the State did not sustain the charge set forth in that count.

4. Denial of speedy trial, or denial of due process—in the absence of facts constitutes no ground for relief. Here the Petitioner was arrested on March 17, 1962, and his trial began on May 21, 1962, and concluded on May 28, 1962. (Spencer v. Warden, 222 Md. 582; Daniels v. Warden, 222 Md. 606; Farley v. Warden, 223 Md. 647; Fisher v. Warden, 224 Md. 669).

At the hearing on May 16, 1963, the Petitioner advances an additional contention—that the Grand Jury of Baltimore City returned the indictment in question against him based on hearsay evidence. This contention is also without [fol. 66] merit for this is a matter that cannot be reached under the Act.

He further testified that he was not satisfied with the services of his attorney, Mr. Michael F. Freedman, because he failed to object to hearsay evidence at the trial. This is a bald assertion unsupported by any specifics, and is also without merit. He does not claim that his attorney for any other reason was incompetent or failed to properly represent him.

For the above reasons it is ORDERED this 24th day of May, 1963, that the Petition be and it is hereby dismissed.

/s/ ANSELM SODARO
Judge

[fol. 67]

EXHIBIT B TO ANSWER

IN THE CRIMINAL COURT

OF

BALTIMORE

Indictment #1259/1962

Post Conviction #452

IN THE MATTER OF

BENNIE JOE HAYDEN

VS.

WARDEN, MARYLAND PENITENTIARY.

Hearing under the Uniform Post Conviction Procedure Act

ORDER DENYING RELIEF AND DISMISSING PETITION—
March 19, 1964

Pursuant to the Mandate of the Court of Appeals of Maryland in the case of Bennie Joe Hayden v. Warden, Maryland Penitentiary, Appeal No. 40 September Term 1963, filed December 12, 1963, Md. , 195 Atl. 2d 692, a hearing was held on March 19, 1964, to determine whether in fact the Petitioner had been illegally arrested, searched and seized. The Petitioner was present at this hearing and represented by court appointed counsel.

The Petitioner testified that on March 17, 1962, he was arrested in his home after being awakened from sleep; that his home was searched, certain articles were seized and he was subsequently taken to the police station; that there was no warrant of arrest. He testified further that his wife opened the door of his home; that he placed the

gun (which had apparently been used in the holdup) in the toilet bowl; that he was therefore illegally arrested and illegally searched.

The State produced Officer Parrish, one of the arresting officers, who testified that while riding in a cruising patrol he received a call that a holdup had been perpetrated at the lunchroom in the Diamond Cab Company; that after receiving the call he was directed by a cab driver, who had apparently seen the defendant leave the premises where the holdup had taken place and run from the lunchroom into a dwelling at 2111 Koko Lane. Acting on the information received over the air and upon the direction of the cab driver who followed the defendant to the Koko Lane address, the policeman rapped on the door of 2111 Koko Lane; he was admitted by the defendant's wife. The [fol. 68] defendant's wife gave the policeman permission to enter the home; he then went upstairs to the bedroom where he found the defendant in bed; the bullets and the gun clip, and a hat and shirt of the defendant, were found under the pillow. The defendant was subsequently taken to the police station and charged with the offense. The defendant was identified in court by two cab drivers who observed him running from the lunchroom to his home.

From the testimony before me I have concluded that the Petitioner's contention is without merit, and that his arrest was legal and that the search of his home and the seizure of the articles in question were proper.

For the above reasons it is ORDERED this 19th day of March, 1964, that the Petition be and it is hereby dismissed.

ANSELM SODARO
Judge

3/19/64

[fol. 73] EXHIBIT C TO ANSWER

PETITIONER'S EXHIBIT NO. 1 (ID)

Civil

NAME Bennie Hayden No 7529
ADDRESS 954 Forrest Street
Baltimore, Maryland

M The Hon. J. Floyd Young Esquire,
STREET Clerk, Court of Appeals of Maryland
CITY Annapolis STATE Maryland

DATE April 25, 1964

Dear Mr. Young

I have an application for leave to appeal under the post conviction procedure act which is docketed at No 18 Sept term 1964. Since the opinion by Judge Sodaro is based on assertions contrary to the trial testimony which is in the trial transcript.

After considering the opinion and the transcript I feel that this appeal is worthless since the statements in the opinion are far from being true, this being so I feel it is the wiser course to refile again in the lower state court and since I can not have two actions pending at the same time I must withdraw my application for leave to appeal.

I am sorry I waited so late to make up my mind but I am no lawyer and it took me quite some time to make the wiser decision.

Yours Very Truly

/s/ BENNIE JOE HAYDEN

[fol. 76] EXHIBIT E TO ANSWER

IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, MARYLAND

BENNIE JOE HAYDEN *

vs. * No. 1493-A MISC. DOCKET No. 2

WARDEN *
MARYLAND PENITENTIARY *

MEMORANDUM OPINION—May 13, 1964

Bennie Joe Hayden has made application for the issuance of the Writ of Habeas Corpus. His contention is that his arrest and search of his home and the seizure of evidence therefrom was invalid and illegal. This Court was advised that Hayden has filed several applications for habeas corpus in Federal Courts and also had a Post Conviction Hearing before Judge Sodaro, which was appealed and the Court of Appeals sent the case back to Judge Sodaro for a determination as to the Defendant's arrest and incidental search and seizure thereto. A hearing was held before Judge Sodaro and this Court has received a copy of his findings of fact. Judge Sodaro held that the arrest, search and incidental seizure on the premises were legal. The Petitioner had the right of appeal from this decision which was filed on March 19, 1964, to the Court of Appeals. There is no need for this Court to hold a hearing on Defendant's Petition as all the witnesses having any knowledge of the arrest, the search and the seizure were present before Judge Sodaro and from the testimony reviewed in his Opinion, there would be no question whatsoever in this or any Court's mind that would show the con-
[fol. 77] stitutional rights of Hayden had been violated. The Petition for the issuance of the Writ is hereby dismissed.

D. K. McLaughlin

Dated: May 13, 1964.

ORDER OF COURT

The Court has received an application for the issuance of a Writ of Habeas Corpus, which application has been filed and made a part of the record in this case.

After consideration, the application is hereby dismissed this 13th day of May, A. D. 1964 for the reasons stated in the Opinion attached hereto.

D. K. McLaughlin

Dated: May 13, 1964.

[fol. 78] EXHIBIT F TO ANSWER

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

STATE OF MARYLAND Ex rel: BENNIE JOE HAYDEN Petitioner	:	
vs.	:	Law No. 23,364
WARDEN, MARYLAND PENITENTIARY Respondent	:	

OPINION AND ORDER OF COURT—June 12, 1964

Bennie Joe Hayden applied to this court for issuance of the Writ of Habeas Corpus in a petition dated May 19, 1964, which raises the matters of illegal search, seizure, trial, conviction and sentence. This petition, along with its letter of enclosure dated May 27, 1964, the trial transcript and a supplementary letter of May 29, 1964, would seem to substantially comply with Rule Z42, Maryland Rules of Procedure, Application—Form and Content.

The application is dismissed pursuant to Rule Z44(2), When the Writ Shall Issue—Exceptions, in as much as it

appears from the opinion of Judge McLaughlin, dated May 13, 1964, which denied a similar application for issuance of the Writ of Habeas Corpus filed in the Circuit Court of Washington County, that the legality of the petitioner's confinement was determined by Judge Sodaro under the Uniform Post Conviction Act. In that proceeding Judge Solaro held that the arrest, search and incidental seizure on the premises were legal. The petitioner appealed from that finding on March 19, 1964 to the Court of Appeals.

The new points raised by petitioner relate to the hearing under the Post Conviction Act; namely the failure to hear from several witnesses he deems vital to his case. This would not be a meritorious objection in the absence of some special circumstances, but in any event it can not be [fol. 79] pursued until the petitioner's appeal under the Post Conviction Act is disposed of by the Court of Appeals.

It is thereupon this 11th day of June, 1964, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that the Application for issuance of the Writ of Habeas Corpus in this matter be, and the same is hereby denied and the petition is dismissed. Leave to file in Forma Pauperis is hereby granted.

/s/ WM B. BOWIE
Judge

[fol. 80] EXHIBIT G TO ANSWER

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

STATE OF MARYLAND Ex rel:	:	
BENNIE JOE HAYDEN	:	
Petitioner	:	
vs.	:	Law No. 23,364
WARDEN,	:	
MARYLAND PENITENTIARY	:	
Respondent	:	

OPINION AND ORDER OF COURT—June 30, 1964

Bennie Joe Hayden has again applied to this court for issuance of the Writ of Habeas Corpus following our dismissal of his prior application on June 11, 1964.

On June 11, 1964 we found the legality of Hayden's confinement had been determined by Judge Sodaro under the Uniform Post Conviction Act, and that his objections pertaining to a lack of vital witnesses, while not being a meritorious objection in the absence of special circumstances, could not be pursued until his application for leave to appeal had been disposed of by the Court of Appeals. Judge Sodaro's finding was one of fact pursuant to the mandate from the Court of Appeals in *Hayden v. Warden*, 233 Md. 612.

Hayden's current petition informs the court that he withdrew his application for leave to appeal on April 24, 1964 because the testimony of Officer Parrish was not fact according to the transcript of the original trial. Regardless of the merit of this allegation, Hayden, who was represented by court appointed counsel, was free to contradict Officer Parrish while he was on the witness stand and to impeach his credibility with the trial transcript itself. In short, Hayden has had his day in court on the issue of illegal arrest, search and seizure and all of his objections to the conduct of that hearing must be addressed to the

court with jurisdiction to hear them. That jurisdiction is reposed only in the Court of Appeals.

[fol. 81] Pursuant to Rule Z44, it is thereupon this 29th day of June, 1964, by the Circuit Court for Prince George's County, Maryland,

ORDERED, that the Application for issuance of the Writ of Habeas Corpus in this matter be, and the same is hereby denied and the petition is dismissed. Leave to file in Forma Pauperis is hereby granted.

/s/ WM. B. BOWIE
Judge

[fol. 84]

IN THE CRIMINAL COURT OF BALTIMORE

P. C. P. A. Petition #452

STATE OF MARYLAND,

vs.

BENNIE JOE HAYDEN.

Indictment No. 1259, of 1962
Robbery with deadly weapon, etc.

Excerpts From Stenographic Transcript

Before: Honorable Anselm Sodaro.

March 19, 1964

* * * * * * *

[fol. 92] The Witness: Officer Marvin Parrish, Northwestern District.

Direct examination.

By Mr. Bricker:

Q. On March 17, 1962, you made the arrest of Bennie Joe Hayden, the defendant, is that right?

A. Yes, sir.

Q. At 2111 Koko Lane?

A. That's right.

Q. Under what circumstances did you arrive at that address and take into custody Mr. Hayden?

A. I will have to refer to the records because of the lapse of time. About 8:05 A. M. on March 17, 1962, I was operating radio car #61, which was manned by me and Officer John Duerr. We received a call to Diamond Cab Company, 1920 Ashburton Street, a holdup. We were in response to this call, and received further information from the police radio that the colored subject, described wearing a light hat and dark jacket ran to 2111 Koko Lane.

The Court: Repeat that. You had information about what?

[fol. 93] The Witness: We received further information from the dispatcher over police radio that the subject was being pursued, and further information stated he ran into the dwelling at 2111 Koko Lane.

By Mr. Bricker:

Q. Is it not true the information you received on the police radio was another cab driver, named Sol Sargowitz saw the alleged holdup man run west on Walbrook Avenue, and that he was followed by apparently two other cab drivers, who kept him in sight until he arrived at 2111 Koko Lane?

A. That's correct.

Q. That is the information you got?

A. Yes, sir.

Q. Acting upon that information, you went to this address, is that right?

A. That's right.

Q. What happened at your arrival at 2111 Koko Lane?

A. Upon arrival we knocked on the door. A lady identified as Joyce Hayden let us in. We asked her if she was the lady of the house. She said, "Yes." "Was her

husband home? We would like to speak to him." So, we [fol. 94] went upstairs, and that's where we found the defendant in bed in a rear bedroom.

Q. You made a search of the premises?

A. After waking Mr. Hayden up and asking him would he accompany us to the station house.

Q. And found this gun and shotgun?

A. That's correct.

Q. And found a clip of eight bullets from a P-38 and a hat and sweater?

A. That's right. He was later identified by this cab driver who kept him under observation from the time he left the Ashburton—

* * * * * * *

[fol. 95] Cross examination.

By Mr. Campanaro:

* * * * * * *

[fol. 96] Q. Why did you go into the house?

A. She admitted us.

Q. For what purpose? Did you tell her you were going to search the house?

A. At that time, no, we didn't.

[fol. 97] Q. Then you proceeded to search?

A. At the time we entered we went upstairs to find whether Mr. Hayden was there.

Q. Did you have a warrant to go into the house?

A. We didn't have to, no, sir.

Q. Did you have a warrant for searching the house?

A. We didn't have a warrant at that time.

Q. Is it not a fact you searched the house before you placed Hayden under arrest?

A. No, we did not.

Q. You are positive of that?

A. I am positive.

Q. How many policemen went to the house the first time?

A. Only two. Then two or three more responded.

Q. So, four or more policemen came with you and Officer Duerr into the house at the same time?

A. I would say approximately the same time.

* * * * * * *

[fol. 107]

EXHIBIT D TO ANSWER

[Letterhead of]
COURT OF APPEALS OF MARYLAND

ANNAPOLIS, MD. 21404

TELEPHONES: 263-4261
263-2411

(Emblem)

J. LLOYD YOUNG
CLERK

JAMES H. NORRIS, JR.
CHIEF DEPUTY

OLIVE JANE RICHARDS
VIRGINIA STEHLE HUBBARD
MARY J. MORRIS
DEPUTIES

April 29, 1964

Bennie Joe Hayden #7529
Maryland Penitentiary
954 Forrest Street
Baltimore, Maryland 21202

Re: Application for Leave to Appeal No. 18,
September Term, 1964.

Dear Sir:

In accordance with the instruction contained in your letter of April 25th, 1964, we have this date withdrawn the

above entitled application in your name and returned the record to the Criminal Court of Baltimore.

Very truly yours,

/s/ James H. Norris, Jr.
Chief Deputy

JHNjr/mjm

cc: Office of the Attorney General
Administrative Office of the Courts
State's Attorney for Baltimore City

[fol. 108]

In the United States District Court
For the District of Maryland

Civil No. 14388

Bennie Joe Hayden,

v.

Warden, Maryland Penitentiary.

Opinion—March 3, 1965

Alva P. Weaver, III, court-appointed, for petitioner.

Thomas B. Finan, Attorney General of Maryland, and Franklin Goldstein, Assistant Attorney General, for respondent.

Thomsen, Chief Judge:

Petitioner (Hayden) is serving a sentence of fourteen years in the Maryland Penitentiary following his conviction by Judge Manley in the Criminal Court of Baltimore

of robbery with a deadly weapon. In his present petition for a writ of habeas corpus and at the hearing thereon he pressed five contentions: (1) that his arrest was illegal; (2) that a search of his house and the seizure of guns, ammunition and clothing made at the time of his arrest was illegal; (3) that his representation at his trial in the Criminal Court was inadequate, because no objection was made to the introduction into evidence of the material so seized; (4) that the prosecuting witness failed to identify him; and (5) that the indictment was based on hearsay.

In view of various proceedings in the State Courts and the failure of Hayden to enter or to press certain appeals or applications to appeal to the Court of Appeals of Maryland, there is serious doubt as to what questions Hayden is entitled to raise here. Nevertheless, this Court has per-
[fol. 109] mitted Hayden and his counsel to offer in evidence whatever testimony and exhibits they wished to offer, including the transcripts of his trial in May 1962 and of the hearing before Judge Sodaro in March 1964. There is some conflict between the testimony of the witnesses given at the trial and their testimony in this Court, largely due to the lapse of time. As Hayden's wife recognized on the stand, she did not remember all the details after three years. Neither did the busy police officers. Hayden himself is not a trustworthy witness. From all the evidence, after weighing the credibility of the witnesses, this Court finds the following facts.

On or before March 16, 1962, a man named Miller delivered to Hayden a sawed-off shotgun and a P .38 Luger pistol, and Hayden acquired through Miller or otherwise some ammunition for both weapons. About 8 a.m. on March 17, armed with the pistol and perhaps also with the gun, Hayden struck Charles E. McGuirk on the head with the pistol and robbed him of some $363, which he had just obtained from the cashier's cage of the Diamond Cab Company. Two cab drivers saw Hayden running from the scene of the crime, looking back over his shoulder; they gave the alarm, and both of them followed him several blocks to his

home at 2111 Koko Lane, which one of the drivers saw him enter. The Diamond Cab dispatcher reported to the police what he had learned from the victim and what he had learned over the radio from one of the cab drivers. This information was relayed over the police radio to a number of patrol cars, which came to Koko Lane promptly, some in less than five minutes after Hayden had entered the house. One of the cab drivers, who had parked at the corner nearest 2111 Koko Lane, pointed out to the officers the house [fol. 110] which Hayden had entered; the officers knocked at the door, which was opened by Mrs. Hayden; they told her that they were looking for a robber who was reported to have entered the house, and said they would like to speak to her husband and search the house. She offered no objection. Based upon the testimony offered before him at the Post Conviction Procedure Act (PCPA) hearing, Judge Sodaro found that Mrs. Hayden "gave the policeman permission to enter the home". The fuller evidence before this Court is conflicting, but this Court need not decide whether to accept the State Court's finding of that historical fact, nor resolve the conflict in the testimony, because it is clear that the officers had reasonable cause to believe that a felony had been committed and that the felon had entered the house; under the law discussed below, they were justified in entering and searching the house for the felon, for his weapons and for the fruits of the robbery.

Hayden was feigning sleep in the back room on the second floor. Two or three officers roused and questioned him, and when the officers who were searching the first floor and the cellar reported that no other man was in the house, they arrested him. At about the same time one of the officers noticed that the toilet in the adjoining bathroom was running continuously, and found the shotgun and pistol immersed in the flush tank. The officers found a clip of ammunition for the pistol, a sweater and a cap under the mattress of Hayden's bed, and ammunition for the shotgun in a bureau drawer in Hayden's room. Meanwhile, the

officer who was searching the cellar for a man or the money found a jacket and trousers of the type the fleeing man was said to have worn, with a leather belt still in place, [fol. 111] in a washing machine.

Hayden was arrested and taken to the police station, along with the items referred to above. He made no admissions to the police. He was represented by counsel at his preliminary hearing, and after his indictment engaged an attorney with wide experience in criminal cases to represent him at his trial.

The victim could not identify Hayden, but described the clothing worn by the robber, and testified that the weapon held by the robber had a barrel like the P .38. The two taxi drivers identified Hayden as the man they saw running from the scene of the robbery. Several police officers testified, and the guns, ammunition and clothing seized at the time of the arrest were admitted in evidence without objection. The strategy of Hayden's trial counsel was to question the identification of Hayden and to attack the credibility of the important State witnesses by vigorous cross-examination with respect to the color of the clothes and other matters. He felt that there were reasonable grounds for the arrest and the search, and since the explanation which he had for the pistol included the shotgun, felt there was no point in objecting to the introduction into evidence of the gun and its ammunition. The introduction into evidence of the sweater helped rather than hurt Hayden; the State might have been criticized if it had failed to produce the sweater, which was found under the mattress and was not like the clothing described by the victim and other State witnesses. Judge Manley postponed the closing of the testimony so that the defendant might produce Miller. After argument on May 28, 1962, Judge Manley found Hayden guilty of robbery with a deadly weapon.[1] Sentence [fol. 112] was postponed pending a possible motion for a

[1] The reasons Judge Manley gave for his findings are set out in the transcript of the trial, pp. 152-154.

new trial, but after Hayden had discussed the matter with his trial counsel he decided not to file such a motion. He was sentenced on June 8, 1962, to a term of fourteen years, accounting from March 17, 1962.

Contrary to the testimony of Hayden, this Court finds that his trial counsel advised him of his right of appeal, and told him how he might proceed in forma pauperis. Hayden, however, decided not to appeal, probably because the sentence might have been considerably longer, but parted with his counsel on the note that they would seek parole after three and a half years.

As soon as Hayden reached the penitentiary he received "legal" advice from his fellow inmates, and filed a petition under the PCPA in less than three weeks, on June 28, 1962. Before that petition could be heard he filed, on August 8, 1962, a motion to strike the conviction and sentence. The latter motion was heard first and was denied on November 14, 1962. An appeal from that denial was dismissed on January 17, 1963.

On April 23, 1963, an experienced attorney was appointed to represent Hayden in his PCPA proceeding. In his amended petition for relief therein he asserted: (1) that his home was forcibly entered and searched; (2) that the prosecuting witness failed to positively identify him; (3) that the *nolle prosequi* by the State of a count in the indictment was proof of innocence; and (4) that he had been denied a speedy trial. At the post conviction hearing, he further asserted (5) that he was indicted on hearsay evidence and (6) that he was dissatisfied with the services of trial counsel for failure to object to hearsay evidence produced at the trial.

Judge Sodaro disposed of all of those contentions after a [fol. 113] hearing at which no testimony was taken. Only two of his rulings are important here: (1) Judge Sodaro held that "questions of the legality of search and seizure relating to the admissibility of evidence obtained by an allegedly illegal search and seizure should have been raised

at the trial, and are not grounds for relief under the Act"; and (6) after noting that Hayden had testified that he was not satisfied with the services of his attorney because the attorney had failed to object to hearsay evidence at the trial, Judge Sodaro stated: "This is a bald assertion unsupported by any specifics, and is also without merit. He does not claim that his attorney for any other reason was incompetent or failed to properly represent him."

Leave to appeal from Judge Sodaro's order was granted and the case was remanded for further proceedings. *Hayden* v. *Warden*, 233 Md. 613, 195 A.2d 692 (1963). The Court of Appeals said:

> "For the reasons stated by Judge Sodaro in the lower court, we agree that the applicant was not entitled to post conviction relief for any of the reasons stated in the second through the sixth contentions, but this may not be true with respect to the first contention, concerning the search of his home and arrest without a warrant which the applicant subsequently stated was his basic contention.
>
> "* * * We think the question should first have been considered as one of fact rather than a question of law."

On remand, Judge Sodaro granted a hearing, at which petitioner, represented by experienced counsel, testified. His wife wrote that she had moved to Detroit and was unable to attend the hearing. Hayden did not suggest that any effort be made to take her deposition. She had testified at the trial, and Hayden was evidently satisfied with that testimony. Officer Parrish was the only officer who was called to testify by either side. On March 19, 1964, Judge [fol. 114] Sodaro filed an order denying relief, in which he set forth specific findings of fact with respect to the arrest and the search and seizure, and as a result of his findings of fact, "concluded that the Petitioner's contention is without merit and that his arrest was legal and that the search

of his home and the seizure of the articles in question were proper."

On March 24, 1964, Hayden filed an application for leave to appeal from Judge Sodaro's order. On April 25, however, Hayden sent a letter to the Clerk of the Court of Appeals of Maryland requesting the withdrawal of the application for leave to appeal. His request was granted on April 29. Hayden thereupon filed three petitions for writs of habeas corpus, one in the Circuit Court for Washington County and two in the Circuit Court for Prince George's County, all of which were denied.

Meanwhile, Hayden had filed two petitions for writs of habeas corpus in this Court, one of which was denied by me on February 4, 1963, and the other by Judge Winter on September 10, 1963, both because Hayden had not exhausted his State remedies.

His State remedies are now exhausted. It is a close question whether failure to appeal from his conviction and his withdrawal of his application for leave to appeal from Judge Sodaro's second order were deliberate by-passes of available State remedies within the meaning of *Fay* v. *Noia*, 372 U.S. 393 (1963), *Hunt* v. *Warden*, 4 Cir., 335 F.2d 936 (1964), and *Pruitt* v. *Peyton*, 4 Cir., 338 F.2d 859 (1964). Hayden is intelligent, familiar with legal terms and concepts, an avid reader of Supreme Court reports, and an untrustworthy witness. The Court of Appeals of [fol. 115] Maryland had already ruled in his favor on one appeal. From the evidence, however, I do not find such a deliberate by-pass or waiver as would prevent his raising in this Court the issues of illegal arrest and illegal search and seizure.

(1) *Legality of Arrest.* This Court would be justified in accepting the findings of historical fact made by Judge Sodaro on that issue following the second hearing before him, which met all of the tests set out in *Townsend* v. *Sain*, 372 U.S. 293 (1963). However, as noted above, this Court need not decide whether to accept the State Court's find-

ing that Mrs. Hayden "gave the policeman permission to enter the home" nor resolve the conflict in the testimony in this Court on that point, because this Court has found from the evidence that the officers had reasonable cause to believe that a felony had been committed and that the felon had entered the house. They were therefore justified in entering the house after announcing their authority and purpose, whether or not permission was given. *Beck* v. *State of Ohio,* 376 U.S. 905 (1964); *Henry* v. *United States,* 361 U.S. 98 (1959); *Draper* v. *United States,* 358 U.S. 307 (1959); *Brinegar* v. *United States,* 338 U.S. 160 (1949); *Carroll* v. *United States,* 267 U.S. 132 (1925); *Chappell* v. *United States,* D.C. Cir., —— F.2d —— (1965); *Miller* v. *United States,* 357 U.S. 301 (1958); *Davis* v. *State,* 236 Md. 389 (1964); *Mulcahy* v. *State,* 221 Md. 413 (1959); see *Ker* v. *California,* 374 U.S. 23, at 37 et seq., *Ralph* v. *Pepersack,* 4 Cir., 335 F.2d 128 (1964).

(2) *Extent of the Search.* Under the evidence the officers were justified in searching the house not only for the man who had been seen entering the house, but also for any weapons he might have used and for the fruits of the crime, the money taken from the victim. The search was made incident to the arrest, and within a few minutes [fol. 116] thereof. The clothing was found while one of the officers was in the basement looking for a man and the money; the pistol and the shotgun were found in the bathroom whose door was three feet from Hayden's room, after an officer noticed that the toilet was running continuously. The search and seizures were not unreasonable. *Harris* v. *United States,* 331 U.S. 145 (1947); *Abel* v. *United States,* 362 U.S. 217 (1960); *United States* v. *Rabinowitz,* 339 U.S. 56 (1950); *Ker* v. *California,* 374 U.S. 23 (1963); *Rees* v. *Peyton,* 4 Cir., —— F.2d —— (1965); *Collins* v. *Klinger,* 9 Cir., 332 F.2d 504 (1964); *Leahy* v. *United States,* 9 Cir., 272 F.2d 47 (1960); *Davis* v. *State,* 236 Md. 389 (1964). The telegram taken from Hayden's pocket at the police station was not the product of an unreasonable search, since his

arrest was legal. *Abel* v. *United States,* supra, at 238-239; *Baskerville* v. *United States,* 10 Cir., 227 F.2d 454 (1955); *Griffin* v. *State,* 232 Md. 389 (1963); *Williams* v. *State,* 229 Md. 329 (1962). See *Ker* v. *California,* supra.

(3) *Adequacy of Representation.* Hayden was represented at his trial by counsel of his own choosing, widely experienced in criminal cases, who exercised his best judgment as to how the case should be tried. Hayden made no objection to his counsel or to the Court at the time, and may well be held to have waived any objections to matters of strategy and tactics. In any event, his representation by his trial counsel was not so inadequate as to amount to a denial of Hayden's constitutional rights. *Snead* v. *Smythe,* 4 Cir., 273 F.2d 838 (1959); *Brown* v. *Pepersack,* 4 Cir., 334 F.2d 9 (1964); cf. *Bowler* v. *Warden,* 4 Cir., 334 F.2d 202 (1964).

(4) *Failure of Prosecuting Witness to Identify Hayden.* In view of the other evidence there is no merit to this point.

(5) *Indictment Based on Hearsay.* If true, and there is no evidence to support the charge, this point would be without merit. *Costello* v. *United States,* 350 U.S. 359 (1956).

[fol. 117] The relief prayed is hereby denied, and Hayden is hereby remanded to the custody of respondent.

Roszel C. Thomsen, Chief Judge, U.S. District Court.

[fol. 118]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[Title omitted]

PETITION FOR LEAVE TO APPEAL—Filed March 15, 1965

The Petitioner, Bennie Joe Hayden, prays Leave to Appeal from the Memorandum and Order of Court denying his Petition for Writ of Habeas Corpus entered on March 3, 1965, and in accordance with the provisions of U. S. C., Title 28, Sec. 753(f), respectfully prays that this Honorable Court pass an Order directing that a transcript of the proceedings of the hearing before the Court on February 17, and 23, 1965, be furnished this Petitioner at the expense of the United States Government.

Bennie Joe Hayden 7529, Petitioner in Proper Person, Maryland Penitentiary, 954 Forrest Street, Baltimore, Maryland 21202.

[fol. 120]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[Title omitted]

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS—March 16, 1965

The Petitioner prays Leave to Proceed and file a Notice to Appeal in Forma Pauperis, and upon request of the Petitioner, it is hereby

Ordered, by the United States District Court for the District of Maryland this 16th day of March, 1965, that the Petitioner is granted Leave to Proceed in his Appeal in Forma Pauperis and that the Official Court Reporter tran-

scribe and furnish the record of the proceedings herein to the Petitioner, without payment of the fee therefore, but said fee shall be paid the United States of America in accordance with the provisions of U. S. C., Title 28, Sec. 753 (f) on behalf of said Petitioner in the above-entitled case.

The Clerk is instructed to send a copy of this Order to the Petitioner.

Roszel C. Thomsen, Chief Judge, United States District Court for the District of Maryland.

[fol. 121]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73(b)—Filed March 16, 1965

Notice is hereby given that Bennie Joe Hayden, Petitioner above-named, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the Memorandum and Order of Court denying his Petition for Writ of Habeas Corpus entered in this action on March 3, 1965.

Bennie Joe Hayden 7529, Petitioner in Proper Person, Maryland Penitentiary, 954 Forrest Street, Baltimore, Maryland 21202.

[fol. 2]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

Civil No. 14388

BENNIE JOE HAYDEN,

vs.

FRANKLIN K. BROUGH, Warden, Maryland Penitentiary.

Excerpts From Transcript of Evidence—February 17, 1965

Baltimore, Maryland
Wednesday, February 17, 1965

The above-entitled matter came on for hearing before His Honor, Roszel C. Thomsen, Chief Judge at ten o'clock a.m.

* * * * * * *

[fol. 9] MARVIN G. PARRISH was called as a witness for and on behalf of the petitioner and, having been first duly sworn, was examined and testified as follows:

* * * * * * *

[fol. 10] Direct examination.

By Mr. Weaver:

Q. Officer Parrish, do you recall the date of March 17, 1962, sir?

A. Yes, sir.

Q. On that date, sir, did you have occasion to be on Koko Avenue?

A. Koko Lane.

Q. Koko Lane?

A. Yes.

Q. And how did it come to pass that you went to that address?

A. Well, about 8:05 that morning, on March the seventeenth, I was in a radio car, 61, with Officer Duerr, and we received a dispatch over the police radio to proceed to 1920 Ashburton Street, a holdup.

Q. Now, what is located at 1920 Ashburton Street?

A. That is the Diamond Cab Company.

Q. All right.

A. And on our way to that location we received additional information that a subject was being pursued, and further information we received over the radio also that the subject had entered 2111 Koko Lane.

* * * * * * *

[fol. 11] Q. And did this further information come over the police radio in your car?

A. Yes, sir.

Q. And from whom did it come? Do you know?

A. It was being relayed from the Diamond Cab Company to us.

Q. Was the information given directly to you from the Diamond Cab office or did it go from the Diamond Cab office to the Central and then to you?

A. It goes from the Diamond Cab to our police radio and then it's relayed to the cars.

Q. And do you know who this source of information was?

[fol. 12] A. Well, it's said that that this subject was being pursued, and we proceeded to 2111 Koko Lane after receiving this information.

Q. But this information you received over the radio call about a subject being pursued, did it describe the subject?

A. It described the subject as a colored subject, about 5 foot 8, twenty-five years, wearing a light hat and dark jacket.

* * * * * * *

Q. And when you got to that location what, if anything, did you find?

A. Well, upon arriving there we were met by a John Falls, who was employed by the Diamond Cab Company.

* * * * * * *

[fol. 13] Q. All right. And where was he when you got there?

A. He was in his cab, 793 was the number of the cab, and he said that the gentleman that he followed from the Diamond Cab ran into 2111 Koko Lane.

* * * * * * *

[fol. 14] Q. And there's no way you can get in or out of one of those houses except either through the front or the back? You can't go out the side?

A. That's correct.

* * * * * * *

[fol. 24] Q. Well, now, you knocked on the door and Joyce Hayden answered the door; is that correct?

A. That is correct.

Q. What conversation transpired between you and her at that time?

A. Well, at that time we told Mrs. Hayden which that we had information that a holdup man had entered that, at that address and due to the lapse of time, I cannot say exactly what we said but in regards, but she said that it would be O.K. for us to look around, and we asked her who was in the house at the present time, and she stated her husband was in bed and a small child was there also.

Q. Well, now Officer, I understand that it's been nearly three years and it's difficult to remember everything, but are you certain, sir, that you told her you were looking for a holdup man in that house or did you just ask her whether or not her husband was home?

A. I believe that we asked her just what I said. I said we had reason to believe that a holdup man had entered, had entered at that address.

Q. All right, and then did you ask her if you could come in?

A. Yes, we did.

[fol. 25] Q. And she said yes?

A. Yes.

Q. Did you tell her for what purpose you were coming in?

A. We told her that we had information that a holdup man had entered at that address.

Q. Did you tell her that you wanted to come in so that you could see if you could locate that holdup man?

A. Yes, and then she said that her husband was upstairs in bed and that she had a small child there also.

Q. All right. Did you ask her for permission to search the premises for anything other than a body or a human?

A. We asked her would it be all right if we could come in.

Q. All right. Did you tell her what you wanted to look around for?

A. Well—

Q. I mean, were you looking for a person; is that what you were interested in?

A. That's correct, at that time we were looking for a person.

Q. So that you asked her permission if you could come into the house to look for a suspect of a holdup?

A. That's correct.

[fol. 26] Q. —man who according to your information had come into the house?

A. That is correct.

Q. And she gave you permission then, according to your recollection, to come into the house to see if you could locate this holdup suspect?

A. That is correct.

Q. Is that correct?

A. That is correct.

Q. And that was the extent of your invitation into the house?

A. That's right.

Q. Is that right?

A. Yes.

Q. Now, Officer, I'm not quarrelling with you and I know that three years has gone by, but I would like to read you your testimony before Judge Sodaro and see if this in any way helps to refresh your recollection about the conversation at the door, and the question placed to you was:

"What happened at your arrival at 2111 Koko Lane?"

And the answer was:

"Upon arrival we knocked on the door. A lady identified as Joyce Hayden let us in. We asked her if she was the lady of the house. She said, 'Yes.' Was her husband home? [fol. 27] We would like to speak to him. So we went upstairs, and that's where we found the defendant in bed in a rear bedroom."

Now, I'm asking you does this conversation related before Judge Sodaro makes no mention of a holdup victim or I mean a robbery of any kind coming into the house but merely mentions the question "Was her husband home? We would like to speak to him." Does that refresh your recollection as to the extent of the conversation that you had with Mrs. Hayden when she let you in the door?

A. Well, I'm sorry but I'll have to say again due to the lapse of time I cannot remember word for word what was said at that time.

Q. All right. When you gained entrance to the house did Mrs. Hayden tell you her husband was upstairs sleeping?

A. She said he was upstairs in bed.

Q. All right. Excuse me, upstairs in the bed?

A. Yes.

Q. What did you do when she told you that?

A. At that time we proceeded upstairs.

* * * * * * *

[fol. 28] Q. And where did you go when you got to the top of the stairs?

A. We went to the rear bedroom.

Q. And when you got to the rear bedroom was Officer Duerr with you?

A. He was with me.

Q. He stayed with you then during this period of time?

A. Yes.

Q. That you came in the house and went up the stairs [fol. 29] and went to the rear bedroom?

The Court: Is it a two-story house?

Mr. Weaver: Yes, sir.

By Mr. Weaver:

Q. Is that right?

A. At this time I can't say for sure whether he stayed with me at all times.

Q. Well, I'm talking about up to the point we reached?

A. We went to the bedroom.

Q. And when you got to the rear bedroom what did you find?

A. We found the defendant, later identified as Mr. Bennie Joe Hayden, in bed.

* * * * * * *

[fol. 31] Q. Do you recall what Mr. Hayden was wearing at the time, Officer?

A. At that time he was dressed in a T-shirt and shorts.

* * * * * * *

[fol. 46] Q. Do you know whether any other officers made any search in the basement other than yourself?

A. Yes, I do.

Q. What other officer did, to your knowledge?

A. Officer John Kennedy, he made a search of the basement also.

* * * * * * *

[fol. 50] Q. Now, Officer Parrish, when you knew, when you received information that a subject had run into 2111 Koko Lane and you arrived at the front of the house and knew that the only way that one could come in or out of that house was the front or the rear, and you further knew that officers would be responding to the call and be in the rear, that you would have the rear of the house watched and the front of the house watched, why didn't you then get a warrant for arrest or to search the premises?

Mr. Goldstein: I object, Your Honor.

By Mr. Weaver:

Q. Rather than going in at that time?

Mr. Goldstein: I'm perfectly willing to argue the law with Mr. Weaver.

The Court: Let's take it subject to exception. If people [fol. 51] can't in hot pursuit pursue armed robbers we are in a desperate state in this country. Maybe that's the law. You'll have to argue the law.

Mr. Goldstein: Do I understand Your Honor to overrule my objection?

The Court: No, I didn't overrule it; I will take it subject to exception so that the whole thing can be in the record and then I expect probably to strike it out on motion.

Mr. Goldstein: If the officer knows.

The Court: I will take it subject to exception. They had the opportunity to go into all this before Judge Sodaro, and they had competent counsel. There must be some limit to the number of times that people can try these points. Go ahead.

By Mr. Weaver:

Q. Do you remember the question, Officer?

A. Yes, I do. We, like I said, let's refer back to how I got the call that a holdup had been committed and fur-

ther information got over the radio that the subject had entered 2111 Koko Lane.

Now, under the circumstances considered this is what we did; we gained admittance, the lady was co-operative, and that is how we entered the house, not against her will.

[fol. 54] OFFICER JOHN KENNEDY

Direct examination.

By Mr. Weaver:

Q. Do you recall under what circumstances it came that you went to those premises?

A. Yes, sir.

Q. Would you tell us, please?

A. Well, approximately 8:10 a.m.

The Clerk: Keep your voice up.

The Witness: Well, approximately 8:10 a.m. on the morning of March 17, 1962 a call came over the air to [fol. 55] investigate a holdup which occurred Waldorf and Ashburton.

Upon receiving this information I acknowledged the call in response. I was nearby the area and that I would also respond.

I responded to the area, upon responding we received further information on the area, on the radio, that the subject had been seen running and was being followed by a cab driver, and the information was being relayed to us by radio.

A description of the subject was given to us by radio, and also the information that the subject had run into the address on Koko Lane. Upon my arrival at Koko Lane I was met by 61 Radio Car and a cruising patrol was also at the scene.

[fol. 59] Q. And when you went into the house, what did you do, sir?

A. I immediately went into the house and I relayed to the other officers there that I would search the basement.

Q. Now, when you went to search the basement, what were you looking for?

A. I was looking for the assailant.

Q. You were looking for a man, were you?

A. I was looking for a man.

Q. All right. And did you request permission of Mr. Hayden or Mrs. Hayden or anyone in the home to search the basement?

A. No, I didn't.

Q. But you went to the basement to search for a man?

A. That's right.

Q. Did you find any man in the basement?

A. No, I did not.

Q. Did you make any search for anything else?

[fol. 60] A. I was also looking for the money.

Q. Did you find the money?

A. No, I did not. By the time I had gotten down into the basement I heard someone say upstairs, "There's a man up here."

Q. So when you're down in the basement you heard them to say they had located a man?

A. That's the information I heard, yes.

Q. All right. What did you do then?

A. By this time I had already discovered some clothing which fit the description of the clothing worn by the subject that we were looking for, hidden in the washing machine.

Q. What do you mean "hidden in the washing machine"?

A. Well, it was placed inside the washing machine, and the clothing still—the clothing still contained a leather belt and I felt that this did not appear to be a proper thing.

Q. Was there any other clothing in the washing machine?

A. No, there wasn't.

Q. Now, what clothing did you find in the washing machine?

A. I found a man's jacket, a man's pair of trousers that was sort of a greenish color that were uniform type of clothing.

* * * * * * * * *

[fol. 61] The Court: Well, he was looking for a man down there and saw, while he was looking for a man he saw this clothing in the washing machine.

Mr. Weaver: Right.

The Court: With a belt which is certainly enough to excite curiosity.

* * * * * * * *

[fol. 68] Q. So that it's your recollection that whatever search was made of the premises was done before Mr. [fol. 69] Hayden left?

A. Yes, to the best of my knowledge. The part of the search that I was involved in was done at that time up until, my part of the search that I know of, that I recall was that I had part in was all done before Mr. Hayden was taken out of the house, and if there were any further search I don't know anything about it because at that time I took the complainant to the hospital to be treated for head wounds.

* * * * * * *

[fol. 75] Q. Officer Kennedy, now that your recollection has been refreshed about the chronology of the events, what is your present recollection of your reason for going into [fol. 76] the basement?

A. My present recollection would be that further search to determine if there was another subject in the house.

Q. Your original purpose in going into the basement was not to search for evidence such as guns, money, or clothes?

A. Well, actually, I would say, the real reason was to go to the bottom of the stairs to look for another subject, to see if there was another subject.

The Court: He has already testified that he was looking for the money.

Mr. Weaver: Yes, sir.

The Court: So that your question is not to look for money and clothes and so forth. He has not said he went to look for clothes. He said he went to look for a man and for money. So that there is nothing inconsistent.

By Mr. Weaver:

Q. Did you have any idea, Officer Kennedy, as to how much money you were looking for? Were you looking for five dollars or a hundred dollars or five thousand dollars or what?

A. No, sir. The way the information came over the air it appeared to me that a cage had been held up. The cage is a depository of money for the Diamond Cab Company. Very large sums of money are held there.

Q. So you were looking for substantial money, you [fol. 77] weren't trying—

A. Substantial.

Q. You weren't trying to find five or ten dollar bills?

A. No.

* * * * * * *

Officer John Kennedy resumed the witness stand and testified further as follows:

Direct examination (Continued).

The Court: Could you see the clothes in the machine [fol. 78] before you opened the top of the machine?

The Witness: No, sir.

The Court: There wasn't a glass?

The Witness: That's right. It was a top to the machine.

The Court: And the top was closed?

The Witness: Yes, sir.

The Court: So that you opened the top before you saw it?

The Witness: Yes, sir.

The Court: There wasn't any hole in the side or glass in the side through which you saw them?

The Witness: No, sir. I saw it by opening the machine.

* * * * * * *

OFFICER EDWIN DUKE.

* * * * * * *

[fol. 79] Direct examination.

By Mr. Weaver:

Q. Officer Duke; did you have occasion on March 17, 1962 to be at the premises known as 2111 Koko Lane?

A. Yes, sir.

Q. And on that date were you operating some sort of a police car?

A. Yes, sir.

Q. Did a call over the radio direct you to those premises?

A. That's correct.

* * * * * * *

[fol. 84] Q. When you saw Mr. Hayden with the other officers, was he in bed or was he standing up or what was he doing?

A. He was up; he was out of bed.

Q. Was he dressed?

A. I believe he was not.

Q. O.K. I'm just trying to get my chronology in order. Then, after you saw that, now, what did you do at that time?

A. Well, I asked, I said, "Did anybody find a gun?"

Q. Whom did you make that comment to?

A. Just a general comment to the officers that were in the bedroom with Mr. Hayden, and someone said, "No, we didn't find a gun yet."

Q. I just want you to tell me what you did?

A. So at that point I heard the flush tank in the bathroom running; so I've searched places before, and I figured well, maybe there was a gun in that flush tank.

So I went to the flush tank and opened it up. I found [fol. 85] two guns. I found a shotgun, a sawed-off shotgun, and I found a P .38 automatic.

Q. Now, this was—

The Court: You found two and—
Mr. Weaver: He found a P .38 automatic.
The Court: A P .38?
Mr. Weaver: A P .38 automatic.
The Court: And the other was a—
Mr. Weaver: A sawed-off shotgun.
The Court: A sawed-off shotgun.

By Mr. Weaver:

Q. And that was found in the bathroom?
A. In the flush tank in the toilet.
Q. Well, that's what I'm trying to lead him to, in the flush tank of the toilet?
A. That's correct.
Q. The flush tank, is that bowl that sits up behind the part you sit on and has water in it?
A. It has all the action in it.

The Court: And he said it was running.

By Mr. Weaver:

Q. You heard water running?
A. Yes.
Q. Now, was there a top to this flush tank?
A. Yes.
[fol. 86] Q. And did you have to remove the top to that flush tank in order to reach in to find—
A. Yes.
Q. The guns?
A. Yes.
Q. The guns were not visible?
A. No, sir.

* * * * * * *

[fol. 87] By Mr. Weaver:

Q. At the time you found these in the flush tank, where was Mr. Hayden?

[fol. 88] A. Mr. Hayden was in the bedroom.

Q. Still in the bedroom?

A. To the best of my knowledge, yes.

Q. And after you got these out of the flush tank in the bathroom, what did you do then?

A. Well, first I dried my sleeve off. I had my arm wet up to the elbow. Then I went into the bedroom and showed Officer Duerr and Officer Parrish what I found, and then I continued to search a little more in the bedroom.

Q. And you searched in the bedroom then next?

A. Yes, sir.

Q. At the time you searched in the bedroom, were Officers Duerr and Parrish still there?

A. They were still in there. They were still getting Mr. Hayden, getting him dressed, and I fished around there a little bit, looked under the mattress, and found a clip of ammunition.

* * * * * * *

[fol. 89] Q. And what other than the clip did you find under the mattress?

A. I can't recall. I can't recall anything under the mattress. It's been a long— It's been quite a while, and I did search further and found some shotgun shells in the bureau drawer.

* * * * * * *

Q. Do you recall anything about a cap or a sweater?

[fol. 90] A. I recall something vaguely about a cap or a sweater under the mattress. I'm not sure if I'm the one that pulled them out or not. Like I say, there were several officers in there, and we were going through things, and I'm not too, I'm not too sure.

Q. Well, let me ask you: After you found these items, the gun and the clip and the ammunition, did you take them into your possession and ultimately take them to the police station?

A. Yes, I did.

Q. All right. Now, after you searched the bathroom and then the bedroom, what was your next activity?

A. Well, my next activity was—

Q. When I say "activity" what did you then do?

A. My superior officer arrived on the scene, and I explained to him what I'd found, and he told me to take the articles I'd found up to the station, tag them and make a report.

Q. And then did you leave?

A. Yes, I did.

• • • • • • •

[fol. 91] Q. Now, let me see. Officer Duke, when you went to the scene of the accident or to the scene of 2111 Koko Lane, you had received information over a radio?

A. That's right, that's correct.

Q. What information did you receive with regard to a holdup as to the weapon used?

[fol. 92] A. Well, I understood it was a pistol. I didn't know what kind of pistol, as I recall. I don't recall whether it was a particular caliber or type or anything like that. They may have said, but it was enough information to me to know it was a gun.

• • • • • • •

[fol. 95] JOYCE HAYDEN

• • • • • • •

Direct examination.

By Mr. Weaver:

• • • • • • •

[fol. 96] Q. Now, Mrs. Hayden, do you remember the morning of March 17, 1962?

A. Yes, I do.

Q. And did anything unusual occur on that day that you recall?

A. Yes, I do.

Q. Now, would you tell His Honor, Judge Thomsen, about that?

[fol. 97] A. Well, on that morning my husband and I were in bed asleep.

Q. What time had you gone to bed?

A. I think it was around about 10:30 or 11:00 o'clock.

Q. Had your husband gone to bed with you or had he gone after you or had you both gone at the same time or what?

A. We had gone to bed at the same time.

Q. All right. What was he attired in?

A. Beg pardon?

Q. What was he wearing when you went to bed that night?

A. Shorts and T-shirt.

Q. Was that his usual—

A. That's right.

Q. —his usual method of sleeping?

A. That's right.

Q. All right.

A. There was a lot of banging at the door, and it woke me up, it frightened me, and I ran downstairs.

Q. What were you wearing when you ran downstairs?

A. Nightgown, and I had thrown my robe over me, and I ran downstairs.

I opened the door and there were several police officers standing at the door.

Q. This is the front door?

[fol. 98] A. Yes, that's right.

Q. Continue.

A. It was several police officers standing there. So one of the police officers asked me, "Did a holdup man run in here?"

And I said, "No," and they came on in the house.

Q. Did they ask you could they come in?

A. No, they did not.

Q. Did you invite them in?

A. No, I did not, the only thing—

Q. Did you give them permission to enter?

A. No, I didn't. The only thing that they asked was if a holdup man had ran in my house, and I said, "No", and they just came on in the house. So—

* * * * * * *

[fol. 100] Q. At anytime while they were looking through the house did they ask your permission?

A. No, they did not, because I told them, I said, "You have no right—" no, I said—, I said, "What are you looking for?"

So they wouldn't answer me, and I said, "You have no right to tear up my house apart like this," because even in the bed where my little boy was before I had picked him up the police officers was all up in the mattress of his bed and things like that, all pulling the curtains back and in the closet.

So I said, "You have no right to do this", and one of them told me, he said, "If you don't shut up I'm going to lock you up", like that.

* * * * * * *

[fol. 104] Cross examination.

By Mr. Goldstein:

Q. When the police came in the first time did they ask you anything, Mrs. Hayden?

[fol. 105] A. The only thing that they, one of them asked me was if a holdup man had ran into the house.

Q. Did they ask you anything about guns?

A. No.

Q. They never asked you anything about guns?

A. No.

Q. Did they ask you if your husband owned any guns?

A. No, they didn't ask me anything about guns.

Q. I show you this page of the transcript, Mrs. Hayden, and I ask you to look at this. This is a transcript of the first trial. I have shown it to your husband's attorney.

In response to a question by your husband's attorney, Mr. Freedman—

A. Yes.

Q. He questioned you, and the question was:

"Tell His Honor, don't say they questioned me, say what they said to you and what you said to them, Mrs. Hayden," and, well, I'll read the whole thing. It doesn't mean anything, "And please don't be nervous and crying, you will be all right."

"Answer: They asked me if my husband had been home all night and I told them yes. They asked me did anyone else live in the house. I said no. They asked me if my husband owned any guns. I told them no because I had never [fol. 106] known my husband to own any guns."

Do you recall saying that at the first trial that they had asked you about guns?

Mr. Weaver: Do you want to read the whole thing?

The Witness: Yes.

Mr. Weaver: That's not the whole answer; it's only a part of the answer.

Mr. Goldstein: I'll read the whole thing.

The Court: Read the whole answer.

Mr. Goldstein:

"And when they searched the first time I kept asking them what they were looking for and they wouldn't tell me. But the second time they came back I asked one of the officers what he was looking for, and he said money. So I said, you have no search warrant, you have no right to be in here tearing my things apart like this. And one of them told me to shut up or he would lock me up."

Now, I don't have the next page here with me.

Mr. Weaver:

"So then they just searched everywhere and then they left."

[fol. 107] By Mr. Goldstein:

Q. But do you recall telling the officers that your husband didn't own any guns?

A. Yes, I do, but so much was happening at the time that, you know, that I was upset.

Q. Now, going on on page 101, the question asked you by Mr. Freedman, who was your husband's attorney:

"When was the first time you knew anything about the gun, about the guns that they found?

"Answer: I didn't. When they asked me did my husband own any guns I said no."

Do you recall saying that?

A. Yes.

Q. You just previously said that they didn't ask you about guns?

A. Yes, I know that, but that was three years ago, and it's kind of difficult to remember everything.

[fol. 108] Q. Do you recall seeing the clothing that was found in the washing machine?

A. I had a week's washing in my washing machine.

Q. A whole week's washing in your washing machine?

A. Yes.

Q. And were any of your husband's things in there?

A. Of course.

Q. Do you recall which of your husband's things were in there?

A. Regular clothing, underclothes, shirts, uniforms that he worked in, socks, things like that.

Q. Was there a matching jacket and a pair of pants in there?

A. Yes, he wore, he was a truck driver, and he wore, you know, pants with a matching jacket.

Q. And was the belt left in those pants, do you recall?

A. I don't recall.

* * * * * * *

[fol. 109] Q. Did you at any time when the officers came in say anything to them and tell them not to come in the house?

A. I didn't have a chance to tell them not to come into the house. All they asked me, did a holdup man ran in here, and they came in the house. I didn't have a chance to say any-
[fol. 110] thing.

Q. Well, you told them no, did you not, that a holdup man didn't come into the house?

A. Yes, of course, because no holdup man had entered the house.

Q. Well, how did you know that?

A. I know was nobody home but me and my husband and two children.

Q. But you were upstairs in the bedroom, weren't you?

A. My husband was in the bed with me.

Q. And you were asleep, were you not?

A. Yes.

Q. How do you no one had broken into the house or come into your house while you were asleep?

A. Well, my doors were locked.

Q. And all your windows were locked?

A. Yes, I'm pretty sure.

Q. You didn't have any air in the house at that time?

A. Any air?

Q. Yes.

A. Well, I think it was in March, it was kind of cool then.

Q. And all the windows were closed and locked?

[fol. 111] A. Yes.

Q. But you hadn't looked over the whole house, had you?

A. No, no, I hadn't.

[fol. 113] BENNIE JOE HAYDEN.

* * * * * * *

[fol. 114] Direct examination.

By Mr: Weaver:

Q. Mr. Hayden, you're the petitioner in this case; is that correct?

A. Yes.

Q. Now, in your petition you have sought several grounds for relief, asking this Court to grant the issuance of a writ of habeas corpus, and one of the grounds set forth in your petition is that you were illegally arrested.

Now, would you be kind enough to relate to His Honor, Judge Thomsen, the basis for your complaint that you were illegally arrested?

A. Well, at the time that the police arrested me I didn't feel that they had probable cause to feel that I had committed a felony, and I, at the rest of the hearing they had never referred to any specific person particularly.

They only referred to a colored subject described as wearing a light hat and a dark jacket.

This height, in reference to height and the approximate age is the first time that I have ever heard this is when I came into this Court today.

After they had gotten into the house they come up to the second floor bedroom first, and then they made a search to find out whether there was anyone else in the house, and after they found out that it wasn't anyone else [fol. 115] in the house, at this time, at this time, this is the time that I was placed under arrest, and I feel that if they had probable cause that I fitted the description of the person that they had in mind, well, why, why wasn't, why wasn't I arrested when they first saw me, why did they see whether anyone else was in the house or not.

Q. You have also asserted in your petition for relief that there was an unlawful search and seizure, a search of your premises and seizure of items belonging to you.

Would you relate to His Honor, Judge Thomsen, your basis for that allegation?

A. Well, I feel that the search was exploratory, that they had no specific items in mind that they knew of at the time of the search that was supposed to have been instrumentality of the crime.

They said, in one officer's testimony that he was, after they locked me up, that he was looking for a weapon and for any money, but they seized a lot of other things, other than the things he said he was looking for at first.

And after I got to the police station they took a telegram out of my pocket. In the way that I had a pair of pants on the telegram was in the pocket. But when they woke me up they were already in the closets and they had [fol. 116] the bureau drawers opened, and there were a lot of clothes spread on the floor like, and I had on nothing but my shorts and T-shirt.

I picked a pair of pants up and put them on and this telegram was in the pair of pants that I selected from the floor to put on.

And they searched everywhere. In my opinion they had nothing specific they were looking for, and they, in one part of the testimony, the officer, Officer Duerr he testified at the trial he was looking for anything he could find. He had no specific item in mind whatsoever.

* * * * * * *

[fol. 119] Q. All right. Now, Mr. Hayden, in open court today, Judge Thomsen has permitted us to amend your petition for relief to include a further ground as to the competency of your counsel in your legal representation at the trial before Judge Manley, which was back in May of 1962, beginning on the 21st of May and ending on the 28th of May.

Now, there has also been—well, strike that.

Did Mr. Freedman, did you tell or have any conversation, with your counsel, Mr. Freedman, of your objections to the introduction into evidence of these matters, of the guns and the clip, and the jacket and so forth that were

seized by the officers complaining as to whether or not they were lawful or unlawful?

A. Well, in that matter I didn't go into any extent because at that time I didn't know anything about law; but I had heard of a search and seizure warrant.

I asked Mr. Freedman when he first came to the City—Baltimore City Jail to see me, did the police, did they have a right to search my house without a warrant, and he said, "The police don't need a search warrant in felony cases. Who told you that?"

[fol. 120] I said, "Well, if they don't need one I guess it's not important who told me," and I didn't discuss it any further length.

And he asked me, "Did they find any money in your house?"

I said, "Not to my knowledge", and I told him what they did find, and he told me that I would have to take the stand and explain to the judge about these things taken out of my house.

Q. All right, now. This gun, the shotgun was in your house; right?

A. Yes, it was.

Q. Now, this was also offered in evidence at the trial?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. Now do you feel that the introduction of that sawed-off shotgun at the trial and the shotgun shells were—wait a minute. Wait a minute till I finish.

Mr. Goldstein: All right.

By Mr. Weaver:

Q. —were prejudicial to you and to your trial, and if you feel that way, what are your reasons for that feeling?

* * * * * * *

[fol. 121] The Witness: Well, my testimony in reference to the evidence that was taken out of my house was actually what was damaging to me, and in the conclusion of the trial Judge Manley found that the inconsistencies between my testimony and the, Joe Miller was because it was the reason of his finding me guilty, and he said that, he specifically said that the only miss...g, the only missing link was the money, and I don't think that's too important because anything could have happened to the money the way the man tried to hide the other things in different places, just that anything could have happened to the money, except that he referred to everything that had [fol. 122] been taken, had been used in the trial.

* * * * * * *

[fol. 123] Cross examination.

By Mr. Goldstein:

* * * * * * *

[fol. 124] Q. And somebody knocked you on the foot with a night stick. Do you know who that was?

A. I knew it was a police officer.

Q. Do you know now which police officer that was from having seen them at the trial and having seen them here today?

A. No, I cannot identify which one it was, no.

Q. And what, if anything, did he say to you at that time?

A. Well, the first thing he asked me was, he said, "How long have you been here?"

I said, "I don't understand what you mean, how long have I been here?"

He said, "We're asking the questions." He said, "We got a report that a robber ran in here."

I said, "There must be some mistake."

So only about that time, I think it was some more came upstairs, and the ones that were talking to me, the one

that came upstairs told him that "We don't see anyone else [fol. 125] in the house."

So about that time one of them, I don't know which one it was, one of them told me "That you have to go with us." He told me that I was under arrest. I didn't have anything on.

Q. Just a minute. I'll give you a chance to finish, but on that particular point you said that someone came upstairs and told you that they didn't see anyone else in the house. Now, you were here when this first officer over here testified.

Mr. Weaver: Kennedy.

Mr. Goldstein: Would you stand up, Officer?

By Mr. Goldstein:

Q. That's Officer Kennedy.

A. Yes.

Q. Do you recall whether or not he was the one who came up and said—

A. I told you that I could not identify him. It's been three years.

Q. But you recall some officer coming up and saying, "We can't find anybody else in the house", while you were still in the house?

A. Yes, yes, sir, I do.

Q. Do you recall whether or not that officer had anything with him, any of your clothing or anything of that [fol. 126] nature?

A. Well, no, I can't say because, because, see, they had the bed surrounded. They were around the bed when, when, when this was said. Now, he could not have—he didn't even have to be in the bedroom. He could have been standing in the doorway. I do not know; I can't say.

Q. Now, you say the officers told you that they thought a robber had run in there? Is that what you are saying? I didn't understand.

A. No, they told me that they had a report that a robber had ran in there.

Q. They told you that they had a report that a robber had run in there. Did you make any reply to that?

A. I told them that there must be some mistake that nobody ran into my house.

Q. Well, you were asleep at the time, weren't you?

A. That's right. I said to my knowledge.

* * * * * * *

[fol. 127] Q. Now, do you know anything about when the guns were found in the tank in the toilet?

Mr. Weaver: From personal knowledge?

Mr. Goldstein: From personal knowledge.

The Witness: You mean the exact time that they were found?

[fol. 128] By Mr. Goldstein:

Q. Do you know when they were found? Let me ask you this: Did you know that they were found before you left the house?

A. I know they were found before I left the house but before—I think it was Officer, this small one, he told me that the evidence they had was still dripping with water, and he said, "What about these?"

And I didn't say anything. So he said, "You look like a bright young American boy." I didn't say anything.

Q. You didn't say anything. He asked you if you knew anything about the guns, didn't he?

A. Yes, he asked me but at the time I didn't know whether they could search the house and I didn't want to say anything until I talked to a lawyer.

Q. And you didn't say anything?

A. I didn't say anything at all.

Q. But you did see the guns. Did you see the officers search the room, the immediate room in which you were located?

A. Well, when they woke me up they were searching.

• • • • • • •

[fol. 131] Q. Did you object to their looking around? Did you say anything about their looking around?

A. No, sir. Neither did I give them permission.

• • • • • • •

[fol. 135] The Court: He said he didn't know anything about the law but he said he asked Mr. Freedman if people had the right to search his house without a warrant. He didn't say when and that Mr. Freedman had given him some answer dealing with felonies, that it's not necessary for a felony. I suppose at the time Mr. Freedman was talking about arresting, but it's all so vague that you can't [fol. 136] make much out of it, but if Mr. Goldstein wants to—

Mr. Weaver: All right, I'll withdraw the objection.

The Court: —if he wants to tighten it up, it's all right with me.

Mr. Goldstein: Your Honor, we're just trying to get out the facts.

The Court: All right. Go ahead.

The Witness: I specifically asked him about the search. I didn't know anything about arrest at the time. I asked him about the search.

By Mr. Goldstein:

Q. When did you ask him that?

A. When he came, the first time he came to the City Jail.

The Court: When was that?

The Witness: I don't remember the date, sir.

The Court: All right.

By Mr. Weaver:

Q. How long after you had been placed in the City Jail? The day after you got there? A week after you got there or what?

A. Well, I went over to the City Jail on Monday, March 19th. I'm fairly certain this was before the week was out that I saw Mr. Freedman.

[fol. 137] By Mr. Goldstein:

Q. And he came in and talked with you; is that correct?

A. Yes.

Q. And did he ask you about the entire course of events on the day that you were arrested?

A. Yes, sir.

Q. Did you tell him everything that happened?

A. Yes, sir.

Q. And then you say you asked him about whether they could search your house; is that right?

A. I asked him that first. That's when I—that's the first thing I asked him, and he asked me did I give a statement, and I'm certain that this, the first question I asked him about the search and this was all I was interested in at the time.

Q. And you say he asked you if you gave a statement?

A. Yes, I think he did, yes.

Q. And did you tell him that you didn't give a statement?

A. Yes.

Q. And you said he asked you about whether or not they found any money?

A. Well, after he, I asked him about the search, and he told me the police didn't need a search warrant on a felony, [fol. 138] and then he asked me did they find any money, and I said, "Not to my knowledge.".

I don't remember any more discussion about the search warrant but we did talk over about what they taken out of my house.

Q. You did tell him exactly what they found in your house?

A. Yes, sir.

Q. And you told him about the guns?

A. I told him about everything.

Q. About everything?

A. Yes, sir.

Q. At that time you knew everything they had found in your house?

A. Yes, because they had mentioned it at the preliminary hearing.

. . . . . .

[fol. 139] Q. I see. And how many times did Mr. Freedman come to see you while you were in the City Jail?

A. He came to see me several times.

Q. Do you recall how many?

A. No, sir, but he came several times.

Q. Did you ever tell him to do anything that he didn't do?

A. No, sir, I didn't do anything specific to ask him to do myself, you know. If anything needed to be done he was the lawyer and he should know.

Q. He questioned you about the entire circumstances, did he?

A. Yes, he did.

Q. Did you ask him to bring any witnesses in that he didn't bring in?

A. No, sir, not to my knowledge. There was one witness was there for me but the judge at the time of the hearing said that he would, he said he wanted to get this witness there to keep from making a claim later that I was denied [fol. 140] a witness.

At that time the judge suggested getting the witness in, Mr. Freedman stood up and said, "That's all we can do," so it was Judge Manley was the one that more or less insisted that they get the witness.

Q. You're talking about Joe Miller?

A. Yes.

Q. Mr. Freedman represented you throughout your trial, did he not?

A. Yes, he did.

Q. Did you make any suggestions to him during the course of the trial?

A. Not to my knowledge because I wouldn't have any way because if I go to the doctor I'm going to listen to what the doctor says, and if I'm not sick or something I don't need a doctor, See, he was the lawyer; I wasn't the lawyer.

Q. Now, when the trial was concluded did you and Mr. Freedman have any discussions?

A. Not that I remember, no, sir.

Q. Did Mr. Freedman discuss with you the possibility of a motion for a new trial?

A. Well, at the time that Mr. Freedman actually the motion for a new trial, he told—all he said, "I'm going to talk to the judge," and he came back and he said, "You won't be, you won't be sentenced today."

[fol. 141] You have to understand that I had never been in court before. I read, I read the court docket entry and I see where the sentence was deferred pending possible motion for a new trial; but at this time I did not know that this, what was going on, but I did talk to him about it, about a new trial.

The Court: You did talk to Mr. Freedman about a new trial?

The Witness: Yes, sir.

The Court: And I thought you just said a moment ago that you had no discussion with him after the trial?

The Witness: I didn't know what, specifically what he was talking about, Your Honor.

The Court: All right, you did have some discussion with him about a motion for a new trial?

The Witness: Yes.

* * * * * * * *

[fol. 142] Q. You said that you did have a discussion with Mr. Freedman about the trial; is that correct?

A. Yes.

Q. About a new trial?

A. Yes.

Q. Did he talk with you about that?

A. Yes.

Q. In Judge Manley's courtroom?
A. No, sir.
Q. When did he talk to you about that?
A. Down in the bull pen, the bull pen lockup.
Q. When? The same day?
A. It was between the time that I was convicted and the time that I was sentenced; so it has to be the same day.
[fol. 143] Q. The same day that you were convicted?
A. That I was convicted.
Q. The same day that you were convicted?
A. Yes.
Q. I think that was the twenty-eighth?
A. I don't remember the date.

Mr. Goldstein: The transcript is in evidence.
The Court: The same day he was convicted.

By Mr. Goldstein:

Q. Now, what did he say to you about a motion for a new trial?
A. Well, he didn't discuss it to any great length. All he said was, I think, that he said that "Judge Manley is about the best judge you got over here and I think that we got everything that we can hope for," and he said, "You wouldn't want a new trial." He said, "The only thing you could do was to get, was if you could get one," and he said, "Which I doubt, you would only get twenty years," and he said, "You don't have a record, and Judge Manley is not going to give you a lot of time, I don't believe."
That's what he said; that's the last time we discussed it. That is, when I went back up the penitentiary I still didn't know that the sentence had been deferred for the new trial, and I asked him again on this date I said, "I don't feel that the trial was beneficial to me; I don't think that I had [fol. 144] a fair trial."
I didn't know anything specific to tell him. So he said, "Well, it's too late for a motion for a trial, a new trial now."

And then we went on up to the sentence, and the reason I didn't know it wasn't too late was because I didn't know that he had actually had the sentence deferred, and no doubt he told the Judge. I didn't understand what they were doing.

I was under the impression that I was just going back to the City Jail and not to be a sentence, and for what reason I didn't know.

Q. Now, when Mr. Freedman discussed the new trial with you, you indicated that he indicated, that he indicated that it wouldn't do much good. Did he ask you whether or not you wanted a new trial or didn't want a new trial or did you agree with that suggestion?

A. I don't remember whether I agreed with it; all I know I didn't consider the issue any further.

Q. And you didn't discuss it any further with him?

A. No.

Q. Did Mr. Freedman at any time discuss with you the possibility of appeal to the Court of Appeals of Maryland?

A. No, sir, no, sir.

Q. After the sentencing on the day that you went back [fol. 145] to be sentenced, did he say anything to you?

A. After I was sentenced?

Q. Yes, to fourteen years?

A. Yes, he told me "to go to the institution, keep your nose clean, and see you in three-and-a-half years."

Q. Did he discuss appeal with you at all?

A. No, sir.

Q. Did you ask him anything about an appeal?

A. No, sir.

The Court: Three-and-a-half years? Do you know or did he explain what he meant by that?

The Witness: I'm certain he meant parole, Your Honor.

By Mr. Goldstein:

Q. Did you ask him to do anything further at that time?

A. No, sir, I didn't.

Q. Now, you have indicated in your habeas corpus petition that when you went to the penitentiary you discussed with people there as to what remedies you might have; is that correct?

A. Not remedies, no, sir; I discussed the question of search and seizure. There was one fellow there showed me an almanac where I read about the First and Fourth Amendment, and it was then that I filed the postconviction [fol. 146] petition because that was the first time I'd ever been in an institution, and that was all that, you know, that fellows were filing them and if there was anything in them, to file, I guess.

Q. Did any of them ever discuss with you the question of appeal?

A. No, sir.

Q. You never heard about an appeal to the Court of Appeals of Maryland?

A. No, sir, not to my knowledge.

Q. Then you say you filed a postconviction proceeding; is that correct?

A. Yes, sir.

The Court: Well, what was the date of the conviction?

Mr. Weaver: May 28, 1962.

Mr. Goldstein: And the first conviction, the first one, I believe, was filed—

Mr. Weaver: Well, I'm going to object to this, sir, because I don't see the relevancy. Now, the date of the first conviction would be beyond the, would be beyond the compass of the counsel's question, and these dates were admitted at the prior hearing in any event.

The Court: Well, what was the date of the filing of the motion to strike the conviction and sentence?

[fol. 147] Mr. Goldstein: They are in my answer, Your Honor. On June 26, 1962 the petitioner filed a petition under postconviction, under the Postconviction Procedure Act.

The Court: 1962?

Mr. Goldstein: Yes, sir.

The Court: Well, there was something about a motion to strike.

Mr. Goldstein: Subsequently he filed the motion to strike, and that was heard first.

The Court: I see. On June 29, 1962—

Mr. Goldstein: He filed a petition under the Postconviction Procedure Act.

The Court: And he said he heard about his rights under the P.C.P.A. but people that you were talking to in jail or people you were talking about in the penitentiary were telling you about the law but didn't tell you anything about an appeal; is that right?

The Witness: No, sir.

The Court: And you never heard of a right of appeal?

The Witness: No, sir, because I would rather have taken an appeal had I known about appeal at the time because I would have been able to raise more questions.

The Court: And Mr. Freedman never mentioned to you the right of appeal?

[fol. 148] The Witness: No, sir.

The Court: And that the people in the penitentiary never mentioned to you the right of appeal but they told you all about the Postconviction Procedure Act, told you all about motions to strike sentences?

The Witness: No, sir, they didn't tell me all about but only—

The Court: You filed it within a month, didn't you?

Mr. Weaver: On the 26th of June is when the first postconviction procedure—

The Court: That's within a month, wasn't it?

Mr. Weaver: Yes.

* * * * * * *

[fol. 153] Cross examination (Continued).

By Mr. Goldstein:

Q. Now, Mr. Hayden, back on the same point you were actually sentenced on June 8th, were you not?

A. That's right.

Q. After there had been a delay pending a possible filing of a motion for a new trial; is that correct?

A. Yes.

Q. Now, when you went over to the—did you then go to the City Jail? Is that where you were taken?

A. June 8th I went to the penitentiary.

Q. You went to the penitentiary?

A. Yes.

The Court: June 8th?

Mr. Goldstein: Yes.

The Witness: Yes.

The Court: After the date of sentence?

Mr. Goldstein: This was the date of sentence.

The Court: The date of sentence.

By Mr. Goldstein:

Q. Did Mr. Freedman talk to you at all on June 8th?

A. No more than about parole is all.

Q. You didn't discuss appeal with him at all?

[fol. 154] A. No, sir.

Q. And then you went over to the penitentiary, and you began to discuss this case with other people there, did you?

A. Well, yes, sir.

Q. And while you were there you prepared a petition for relief under the Postconviction Procedure Act; is that correct?

A. Well, first someone helped me with it.

Q. First someone helped you with it?

A. Yes.

Q. Did you write it or did someone write it?

A. I wrote it, you know, supplying certain information that I would need, but at the time I didn't know, and we only have two law books over there, you know.

Q. And who was that person that you discussed it with?

A. All I know it was a boy from New York. They call him Baby-Grand. I didn't know his full name.

Q. Now, did you tell him all the facts about your case and your arrest?

A. Not all of them, no, because I didn't look at him as a lawyer more or less as someone say, "Hey, Mack, you know, you can do this, do that." This is all it amounted to, and it's going on every day over there, and after I read [fol. 155] an accident—an article in the papers, why I filed the amended petition but the first petition actually wasn't written right after, you know, was written after I learned more about it.

* * * * * * *

[fol. 156] Q. Now, I would like you to read this Point 1 in your petition?

A. Yes.

Q. And this?

A. That the petitioner opened the door and was forcibly arrested.

[fol. 157] Q. Louder.

The Court: What? That the petitioner opened the door?

Mr. Goldstein: That's what he says in this, and was forcibly arrested.

Mr. Weaver: Then this.

Mr. Goldstein: I'm going to bring that out next.

By Mr. Goldstein:

Q. Then you filed, did you not, an amendment to that?

A. I wrote a letter, the next thing, July 30th was it?

Mr. Weaver: Yes.

The Witness: And I told them that I wasn't the one that opened the door.

By Mr. Goldstein:

Q. That your wife opened the door?

A. Yes.

Q. Now, do you know why this was put in this way in this one?

A. Well, other than the fact that I was referring to the arrest in the bedroom.

Q. And the date of the first one was? The date that you filed that, to the best of your recollection was the 25th day of June?

[fol. 158] A. Yes.

Q. And you took an affidavit before—

A. Shaddock.

Q. Is that someone over in the penitentiary?

A. Yes, sir.

Q. And then you wrote this other letter, and this is all your handwriting, is it not?

A. Yes.

Q. And that is of—what date is that?

A. July 30th.

Q. 1962?

A. Yes.

Q. That you amended it?

A. Yes.

* * * * * * *

[fol. 164] Q. Did you give testimony at that hearing?

A. Yes, I did.

Mr. Weaver: The first hearing before Judge Sodaro.

The Witness: Yes.

The Court: Yes, before Judge Sodaro, and he also testified at the second hearing.

Mr. Weaver: Yes.

[fol. 165] By Mr. Goldstein:

Q. Now, Mr. Hayden, do you recall what happened after the first postconviction hearing with regard to any appeal or anything of that nature?

A. I know I appealed.

Q. You did appeal?

A. After Judge Sodaro denied it.

Q. After the first one?

A. Yes.

Q. And didn't the Court of Appeals reverse and send it back for another hearing?

A. They remanded it. They upheld his decision on the second through the sixth contentions; they remanded it to determine whether it was an illegal search and seizure and an arrest without a warrant.

Q. They sent it back at that point?

A. Yes.

Q. And you had an attorney appointed for you to represent you in the subsequent hearing?

A. Yes.

* * * * * * *

[fol. 166] Q. And did you give all the testimony that you desired to give at that hearing?

A. As best I can remember I did.

Q. And did you after that hearing take an appeal, an application for leave to appeal from that hearing?

A. Yes, I did.

Q. And did you then subsequently withdraw that appeal?

A. Yes.

* * * * * * * *

[fol. 171] Q. Mr. Hayden, I show you this paper which is marked now as Exhibit C to my answer, and see if you recognize that?

A. This is what I wrote.

Q. Is this a copy of the letter which you wrote?

A. Yes.

Q. And I ask you now to look at the next one which is marked Exhibit D and ask you if that is a copy of a letter which you would have received?

A. Yes.

Q. You received that letter?

[fol. 172] A. Yes.

Mr. Goldstein: I would like to offer the first letter, Your Honor, which is marked—it's under the date of April 25, 1965—1964, excuse me.

The Clerk: It will be marked as Respondent's Exhibit 5.

(Above letter was marked Respondent's Exhibit No. 5.)

Mr. Goldstein: And the next, which is the letter from the Court of Appeals to Mr. Hayden as the next exhibit.

The Clerk: Respondent's Exhibit 6.

(Letter was marked Respondent's Exhibit No. 6.)

Mr. Goldstein: I would like to offer them both into evidence at this time.

The Clerk: They are attached to the answer.

The Court: They have not heretofore been offered in evidence.

Mr. Goldstein: No, sir, to the best of my knowledge, they were not.

The Court: There is no record, there is no indication that they have.

Mr. Goldstein: No, sir. They were filed as part of my answer from the beginning, Your Honor, but they were [fol. 173] not offered.

Mr. Weaver: They were referred to.

The Court: They don't seem to have been marked.

Mr. Weaver: They were referred to, sir. I don't recall whether they were actually marked.

The Court: All right.

By Mr. Goldstein:

Q. Now, when you wrote that letter to Mr. Young, that I have just shown you, on April 25, 1964, did you discuss that with anyone prior to writing it?

A. No, no, sir.

Q. Did anyone make any effort to get you to write it?

A. No, sir.

Q. Did anyone persuade you to write it?

A. No, sir.

Q. Did anyone threaten you or in any way request that you write it?

A. No, sir.

Q. You wrote that of your own free will?

A. Yes, sir.

Q. And this was your feeling at the time with regard to that appeal as to what you wanted to do with it?

A. Yes. As I just told you in November when you asked me the same thing, I didn't, I wouldn't accept any type of [fol. 174] information like that from an inmate, but it was, the thing, the only thing I knew to do at the time, and I remember, I remember specifically that you contended that I had deliberately failed to exhaust my State remedies or to commit a bypass, and the Judge said that I didn't, I didn't withdraw the appeal for the purpose of coming into the Federal Court and that because when I withdrew the appeal I went to the State Court and filed three habeas corpus petitions, and it wasn't until then, and the last one I filed the Judge stated in his opinion that I had my day in court and I didn't feel that there was any other avenues open for me in the State.

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[fol. 175] Q. Now, Mr. Hayden, you had appealed to the Court of Appeals or made an application for leave to appeal to the Court of Appeals once before, had you not?

A. Yes.

Q. And that had been granted, had it not?

A. Yes.

Q. And you had received a new hearing, had you not?

A. Yes.

Q. And yet after having that first hearing or application for leave to appeal and winning on that point and getting a new hearing at this point in April of 1964 after receiving a new hearing you decided to withdraw your appeal; is that correct?

A. Yes, sir, because of what was in the opinion from March 19th.

The Court: That's what he said last time. That's what he said last time.

Go ahead.

Mr. Goldstein: That's what I thought.

The Court: It's a little different from what he's saying this time. He's saying now what he said before in November, that he withdrew his appeal because of what had been [fol. 176] said in the opinion or what was not said in the opinion.

The testimony the last time, as I understood it, as my notes indicate, was that he read Judge Sodaro's opinion and most of the facts were absent from the opinion, and they were contrary to the facts that he had testified to, and the witness thought an appeal would be worthless.

Mr. Weaver: That's my recollection also.

The Court: That's my note of what he said.

Mr. Goldstein: That's correct, sir.

The Court: And the question is then whether that amounts to a deliberate bypass within the meaning of these cases.

Mr. Weaver: If Your Honor please—

The Court: Within the meaning of those cases.

Mr. Weaver: Yes.

The Court: It's a question of law and fact.

Mr. Weaver: But even beyond that, sir, after he withdrew his appeal he then continued with the State Court proceedings by filing habeas corpus petitions in the State Courts, and after those were denied, then he came to the Federal Court.

The Court: Well, there is no question that he deliberately failed to go through with an appeal.

Mr. Weaver: That's correct, sir.

The Court: Now, whether that under all the circum-
[fol. 177] stances is a deliberate bypass within the meaning of the Hunt and Edmonson rule is a question of law, as I see it, as to which I will be glad to hear counsel when the time comes.

I'm not saying that I think it is or that it is not.

* * * * * * *

MICHAEL F. FREEDMAN.

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[fol. 178] Direct examination.

By Mr. Weaver:

[fol. 179] Q. Well, that is what I wanted to find out about really, Mr. Freedman, and if you would like time to read the transcript I would be very pleased to supply it to you, but I would like to know in your opinion, sir, why no objection was made to the admissibility of the matters seized at Mr. Hayden's home when they were sought to be introduced by the State at the time of the trial?

A. I think I can answer that. The reason for that was that Mr. Hayden's defense solely was that of mistaken identity; he was the wrong man, and in my opinion it was a sufficient case of good and probable cause for the arrest and the search and seizure, and from the standpoint of its legality I felt that the arrest and search and seizure were good and sufficient law.

* * * * * * *

[fol. 182] Q. Mr. Freedman, if you remember it, do you recall any connection between the robbery that occurred and the sawed-off shotgun?

A. I don't think the sawed-off shotgun had any connection with the robbery.

Q. Now, this was one of the items seized in Mr. Hayden's premises; do you recall that?

A. I recall that.

Q. Now, why when this was offered into evidence if it had no association or connection with the robbery, did you not object to it being offered as an exhibit on behalf of the State?

A. I did not object to it because everything that was seized in his home was produced in court to show it was found there; that's all.

[fol. 183] Q. Did you feel that everything that was seized in his home, Mr. Freedman, would necessarily become admissible at the trial of the case?

A. It could or could not be depending upon the court's ruling, how the court felt about it.

Q. Why did you not enter an objection to it?

A. I didn't enter an objection because I thought it was properly, it was proper evidence to be admitted.

Q. For what reason do you submit, sir, or did you feel that that shotgun would properly be admissible in evidence?

A. That this man, the victim testified that he was attacked with a weapon and injured, struck and beaten and injured with a weapon, and it wasn't clear as to what type of weapon it was, and it could have been any one of any number of types of weapons according to his description.

It could have been either the gun or the shotgun or any weapon that was found by the police, and that's the reason I didn't object to it.

Q. Well, if there were no evidence to tie the shotgun to the actual holdup, wouldn't that make it all the more cogent for you to object?

A. Not necessarily.

Q. —to its being admitted?

A. Not necessarily, because he was attacked by some sort of a weapon.

[fol. 187] Q. Now, after Judge Manley found Mr. Hayden guilty on May 28, 1962, did you file a motion for a new trial?

A. I did not.

Q. And what were your reasons for not doing so?

A. Because I discussed that with Mr. Hayden in the lockup, the City Jail, and I advised him of what rights he had, that we had two days in which to file a motion for a [fol. 188] new trial, the motion could be heard by all the judges of the Supreme Bench, that sentence would be withheld until after their, until they had come to a decision whether to grant him a new trial or not.

I discussed the probability or possibility of a sentence, discussed with him thoroughly after sentence what his rights were, that he could file for a postconviction or after his sentence that he could take his case to the Court of Appeals of Maryland; if he had no funds, how to proceed in that direction, that he could get in touch with Mr. Lawrence Stevens Clerk of the Criminal Court stating that he wanted to take an appeal or posteonviction; and counsel would be appointed for him, if he was without funds; and after discussing it very thoroughly with Mr. Hayden, he decided not to proceed with a motion for a new trial but to take sentence.

When he did that I went and saw His Honor, Judge Manley. I think I did a good job.

He received a sentence of fourteen years when he could very easily could have gotten twenty.

* * * * * * *

[fol. 189] Q. Now, did you ever talk to Mr. Hayden about the Court of Appeals of Maryland, his right to appeal?

A. Of course I did.

Q. When did you do that?

A. I did that in the City Jail, if I'm not mistaken, I think Mr. Hayden recalls it, I'd say I'm ninety-five per cent correct, I can't say I'm a hundred per cent correct, but I visited him in the Maryland Penitentiary. I did see him in the penitentiary, and there I spent a long time with him, and by that time Mr. Hayden had had a whole list of

questions that he desired to ask me, constitutional rights, about postconviction, about appeals.

Q. Do you remember how soon that was after he was sentenced?

A. I don't think it was too long. Perhaps within a month or so he wrote me a letter, and I responded to that letter as I recall very quickly, and I went over to the penitentiary to see him.

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[fol. 2] IN THE CRIMINAL COURT OF BALTIMORE

STATE OF MARYLAND,

—VS—

BENNIE J. HAYDEN.

Indictments #1259-#1260

Excerpts From Trust Transcript of May 21, 22 and 28, 1962

Baltimore, Maryland,
May 21, 1962.

Before Honorable Michael J. Manley, J.

Appearances:

Messrs. Russell White and Benjamin L. Brown, on behalf of the State.

Michael Freedman, Esquire on behalf of the Defendant.

Mr. White: Bennie Joe Hayden, two indictments, #1259 and #1260.

The Clerk: Bennie Joe Hayden. Mr. Freedman. The plea is not guilty, court trial in each case. Thereupon:

[fol. 3] CHARLES E. McGUIRK, * * *

* * * * * * *

Direct examination.

By Mr. White:

* * * * * * *

[fol. 4] Q. I see. Now, directing your attention to March the 17th, did anything unusual happen to you about ten minutes after 8:00 in the morning?

A. Yes, I got robbed.

Q. You got robbed. Now, where was this, and under what circumstances, what happened?

A. Going over to the cage, you know, where I keep change.

* * * * * * *

[fol. 5] A. From over the cage, back to the lunchroom.

Q. Where were you specifically when you got robbed?

A. Down in the stairwell.

Q. The stairwell where, inside Diamond Cab?

A. Diamond Cab, yes.

Q. All right. Now, what happened exactly when you say you got robbed, describe what happened as best you can recall?

A. Well, I come out the door and I got hit on the head.

Q. Came out the door and you got hit on the head. Well, what happened, do you know how you were struck on the head?

A. Yes, struck with a gun, and held the gun on me and took the money and run.

Q. And you were struck on the head with a gun, were you?

[fol. 6] A. Yes.

Q. Did you see the gun when you were struck on the head?

A. Yes, it was a thin long barrel, I don't know what kind.

Q. Well, after you were struck on the head, did you fall down or were you standing up?

A. No, I went up against the wall.

Q. You went up against the wall?

A. Yes.

Q. Then were you unconscious or conscious?

A. Yes, I wasn't unconscious, just like blurry like.

Q. Well, then, after this person struck you on the head with this gun, what happened then, what did this person do?

A. He held the gun on me and said, mother fucker, give me your money, or something like that.

Q. And then he took the money and run. What money did he take?

A. Took $363, $350 lunchroom money and $13 of mine.

[fol. 7] Q. I see. And where did you have that money?

A. In my pocket.

* * * * * * *

[fol. 8] Q. I show you this, designated as a pistol, P 38, can you identify this?

A. I can't identify that gun, but it nad a thin barrel like that.

Q. It had a thin barrel like this.

Mr. White: All right. Your Honor, at this time for identification only, like to offer this gun as State's Exhibit Number 1.

* * * * * * *

[fol. 10] Q. Now, were you able to identify anything about this person that robbed you with respect to clothing or anything?

A. No. The only thing I know he had like a uniform on.

Q. Like a uniform?

A. Yes.

Q. Can you describe it any further, the color or anything like that?

A. It was like a greenish, you know, like a truck driver's

[fol. 11] uniform.

Q. Like a truck driver's uniform?
A. Yes, sir.

The Court: The man that held you up had a uniform on?
Witness: Yes, like a lumber jacket and pants to match.

By Mr. White:

Q. Oh, the pants and shirt matched?
A. Lumber jacket.
Q. I see. You don't recall whether he was white or colored? You recall whether the man was white or colored?
A. I honestly, I couldn't tell you, the only thing I seen was the gun after I turned around.
Q. I see. Were you sober at the time or had you—
A. Oh, yes, I don't drink at all.
Q. You were sober.

Mr. White: All right. Your witness.

Cross examination.

By Mr. Freedman:

* * * * * * *

[fol. 12] Q. And you can't even tell what kind of gun it was, can you?
A. Only by, you know, the thin barrel.
Q. It looked thinner than this, is that right, you said something about thin?
A. I couldn't say whether it was that or not.
Q. Yes. At the police station when you testified at the hearing, didn't you say you were hit with something, you don't know what it was?
A. You see, after he hit me—
Q. Yes.
A. And I turned around he had the gun right on me.
Q. So, actually, you are assuming it was a gun, you are assuming?
[fol. 13] A. Yes, sir.

Q. Didn't you, you are assuming?

A. Yes.

Q. Didn't you testify at the hearing you were hit with something, don't know what you were hit with?

A. I don't know whether I was hit with a gun.

Q. That is right, you don't know whether you were hit with a gun or not.

Now you say it was a gray uniform?

A. I said green, grey or, you know, a truck driver's uniform.

Q. There is a lot of truck drivers around there?

A. A lot of colors, I couldn't tell you either.

Q. And a lot of people around there with uniforms on, aren't there?

A. Probably is.

Q. Yes. And a lot of them around with a similar uniform to what you are talking about, a grey one, is that right?

A. Well, I couldn't say.

Q. This was light grey or green?

A. Like a greenish-grey.

[fol. 14] Q. Greenish-grey. Was it light?

A. No, dark color like a—

Q. On the grey side?

A. No, green side, green.

Q. Green.

A. Like a whipcord uniform.

Q. Whipcord, but it was green?

A. Green, yes.

Q. Green or grey?

A. Green.

Q. Yes.

A. And real dark.

* * * * * * *

[fol. 15] JOHN F. FALLS, * * *

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Direct examination.

By Mr. White:

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[fol. 17] Q. All right. You said you heard someone say, holdup, holdup?

A. Say holdup, holdup, say, don't let him get away. So when I heard that I looked around, I seen a man running, and they said, someone said, that is him, don't let him get away. So I immediately—

* * * * * * *

[fol. 18] Q. All right, go ahead, sir.

A. And someone said, holdup, said, don't let him get away. So, I started the cab up, and I immediately called my dispatcher, and I asked her, she said, yes, there was a—

Mr. Freedman: Objected to, relating a conversation.

By Mr. White:

Q. Don't tell us what your dispatcher said.

The Court: I will sustain it.

By Mr. White:

Q. Anyway, you called your dispatcher. What did you do then?

A. I called my dispatcher; and, after I called my dispatcher I was still watching this man was running.

Q. Did you lose sight of him at all?

A. I never lost sight of him the whole time he was running.

Q. Go ahead.

A. And this man went north on Dukeland Street.

[fol. 19] Q. Went north on Dukeland?

A. That is right, sir.
Q. Go ahead.
A. To Clifton.
Q. To Clifton?
A. That is right.
Q. Where was he when you first saw him?
A. He was headed west on Walbrook.
Q. West on Walbrook and how far, let me show you some pictures, I show you State's Exhibits 2A, B and C. And ask you if you can identify what this shows, this location here?
A. This location here is the Diamond cage in the basement here.
Q. Oh, I see. Now, how far from that was it that you first saw this man running?
A. I didn't see the man when he left that spot.
Q. Where you saw the man, when you first saw him how far was he from this location?
A. I would say, that should be about, I will say, about 60 or 70 feet from there.
[fol. 20] Q. 60 to 70 feet?
A. That is right.
Q. All right. Was it in the same block?
A. In the same block, yes, sir.

The Court: The man was on what street was that you said?
Witness: He was on Walbrook Avenue.

By Mr. White:

Q. All right. Now, you saw him running, then you said he was running west on Walbrook, then you saw him go north on Dukeland to Clifton?
A. That is right.
Q. All right. Now, go ahead from there.
A. And he went east on Clifton.
Q. Okay, east on Clifton. Go ahead.

A. Almost up to Ashburton Street.
Q. Almost to Ashburton?
A. Almost to Ashburton.
Q. Yes.
A. He turned right from Ashburton.
Q. Turned what?
[fol. 21] A. He was headed east, he was headed east on Clifton.
Q. Yes.
A. And he turned from heading east and went back to west on Clifton.
Q. Yes.
A. To Cocoa Lane.
Q. To Cocoa Lane?
A. That is right, sir.
Q. Okay. Go ahead, sir.
A. And Cocoa Lane he went in a house.
Q. Okay. What was the address on Cocoa Lane?
A. I couldn't see the address at the time that he went in. But, after he went in I moved up a little closer and I looked and seen the number was 2111.
Q. 2111 Cocoa Lane was the place he went in, go in the front door, do you know?
A. Went in the front door, sir.
Q. Were you able to describe this person at all?
A. Oh, sure, yes, sir.
Q. Do you see him in the court here today?
[fol. 22] A. Yes, sir.
Q. Would you point to him, please?
A. Sure, sitting here.
Q. All right, indicating the defendant in this case Bennie Joe Hayden. Did you know him before this?
A. No, sir.
Q. Have you ever seen him before to your knowledge?
A. That is right—I don't know whether I seen him or not, I think he is a cab driver, isn't it, I won't say I haven't seen him, but don't know anything about him.

Q. Are you sure this is the man you saw running?

A. I don't even—

Q. Indicating the defendant Bennie Joe Hayden. Do you recall what type clothes he had on?

A. He had on dark clothes.

Q. He had on dark clothes.

Mr. Freedman: Don't show him the clothes first.

By Mr. White:

Q. Well, what did he have on, I mean, in the way of clothing, what type of clothing were they?

A. Well, looked more so like a truck driver uniform, [fol. 23] something like that.

Q. Like a truck driver's uniform. Do you recall whether or not he had anything on his head?

A. He had a cap on his head.

Q. What kind of a cap was it?

A. Looked like it was a dark greyish looking cap.

Q. Something like this?

A. That is the cap he had on, yes, sir.

* * * * * * *

[fol. 24] Q. Were you able to pick anybody out of the lineup?

A. Yes, sir.

Q. Who is that?

A. I picked this man, I seen him up at Walbrook out—

Q. Indicating the defendant Bennie Joe Hayden. In addition to seeing this man run, did you notice whether he was carrying anything?

A. I didn't see anything he was carrying, no, sir.

Q. I see. Didn't see anything he was carrying?

A. No sir.

Mr. White: Your witness.

Cross examination.

By Mr. Freedman:

[fol. 30] Q. All right. Now, when you got to Cocoa Lane, aren't they all row houses, from the outside all look alike on the outside, there is a whole block of row houses?

A. There is a whole block of row houses there.

Q. Yes. And you saw from where you were away the man ran into one of the houses, is that right?

A. He ran in Cocoa Lane, 2111, that is where he went in, yes, sir.

Q. You are sure of that?

A. Positive, sir.

Q. What did you do then when he ran into 2111 Cocoa Lane?

A. I stayed there until the police arrived.

[fol. 31] Q. You stayed there?

A. Until they arrived, yes.

Q. Are you sure that was the house he went into?

A. Positively, yes, sir.

Q. And when the police arrived did you go in there with them?

A. No, sir, when the police arrived I left.

Q. You left?

A. Yes, sir.

Q. Now, at any time did you see the—you never did see the man's face, did you?

A. No more than when I was following him, sir.

Q. But, you never did see his face?

A. I seen him when I was following him.

Q. You were behind him, you were 65 feet behind him?

A. That is when I seen him, I was following him, I seen him, behind him.

Q. Behind him?

A. Yes, sir. That is right, yes, sir.

Q. I ask you again, then, you never did see his face?

[fol. 32] A. I had to see his face to identify him, sir.

Q. Look, if the man is 65 feet in front of you, and you are following him, you are behind him all the time until he ran into the house where was—

A. That is right.

Q. —where was it that you saw his face?

A. Well, he was looking back all the time he was running.

* * * * * * *

[fol. 33] Q. Now, when you got there to the house, the police came immediately, didn't they, within a few minutes?

A. Within a few minutes, yes, sir.

Q. Within about two or three minutes the police were there, is that right?

A. I don't think it was two or three minutes, but they were there not very long.

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[fol. 35] JAMES O. WATERS, 603 Bridgefield Road.

Direct examination.

By Mr. White:

* * * * * * *

[fol. 36] Q. Go ahead, sir.

A. I was getting my car, I heard someone say down the street, stop that man, holdup. I entered my car, I stopped and looked around down the street and saw a fellow running towards me, approaching me.

Q. Were you able to get a good look at him?

A. He is coming directly towards me, I have got to see him.

Q. Go ahead.

A. I didn't pay too much attention when he say holdup the first time, when he said stop him the second time, this is a holdup, he come past me looking towards him, I turned

around and ran after him. I follows him west on Walbrook, he turns north on Dukeland, and I am behind him, [fol. 37] and when he get to, he goes up to Clifton and he turns east on Clifton, well, I lost him at Clifton Street, at Clifton Avenue rather. Well, I goes on down Cocoa Lane and the cab driver is parked down there. I asked him, I said, did you see where that fellow—

Mr. Freedman: Objected to.

By Mr. White:

Q. That is all right, don't tell us about any conversation you had with the cab driver. Now, do you see anybody in court that you recognize?

A. Yes, sir.

Q. Who is that?

A. The fellow sitting right by Mr. Freedman.

Q. Indicating the defendant Bennie Joe Hayden. Was he the person you saw?

A. Yes, sir.

Q. Are you sure?

A. Positive.

Q. What did he have on in the way of clothing?

A. He had on a dark uniform, sir, a two piece.

Q. A two piece uniform?

[fol. 38] A. Right, sir.

Q. And what if anything did he have on his head?

A. All I could see was a darkish grey cap.

Q. A darkish grey cap. Do you know whether he had anything in his possession that you could see?

A. Well, I couldn't see he had anything in his hands because they were swinging; and, when, I did notice when he went by that he had a paper in his back pocket.

Q. A paper in his back pocket. All right. Now, you said that you got up in the vicinity of 2100 Cocoa Lane, did you?

A. Yes.

Q. And you said you saw the cab driver parked in front of where?

A. Well, he wasn't parked exactly in front, he was at the corner.

Q. I see. At the corner?

A. Right.

Q. All right. Where did you go then?

A. I went up to his cab and asked him did he see the fellow.

[fol. 39] Mr. Freedman: Objected to.

By Mr. White:

Q. You went up to his cab?

Mr. Freedman: Objected to.

By Mr. White:

Q. Did you have a conversation with him?

A. Yes, I did.

Q. Now, after that conversation, don't tell us what the conversation was, but after you had the conversation with him where did you go?

A. I went to the alley at the rear of Cocoa Lane.

Q. And were you observing anything when you went back there?

A. Yes, I was.

Q. What were you observing?

A. The rear of the houses.

Q. The rear of the houses?

A. Right, sir.

Q. Well, now, did you stay there until the police got there?

A. That I did.

[fol. 40] Q. Did you see anyone enter any of the houses?

A. I didn't see no one enter or come out of the houses.

* * * * * * *

Cross examination.

By Mr, Freedman:

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[fol. 45] Q. Now, why did you go in the back of the houses on Cocoa Lane?

A. Because he asked me to watch the rear to see that he don't come out, if it not him, anyone.

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[fol. 48] Off. John Duerr, * * *

* * * * * * *

[fol. 49] Direct examination.

By Mr. White:

Q. All right. Officer Duerr, directing your attention to around 8:10 a. m. on March 17th of this year did you have occasion to be working the radio car?

A. Yes, sir, I was.

Q. All right. Did you receive any call around that time?

A. Yes, sir.

Q. To where?

A. About 8:05 a. m. on March the 17th, 1962, while working Radio car 61, Officer Marvin Parrish and myself received a call to 1920 Ashburton Street, the Diamond Cab, a holdup.

Q. I see. All right. And did you talk with anyone when you got there or see anything?

A. Well, enroute to the Diamond Cab Company, we received additional information from communications over our police radio that a colored subject—

[fol. 50] Mr. Freedman: Don't tell—

By Mr. White:

Q. Don't tell us what it is, but what did you do as a result of receiving that information?

A. Well, we responded to 2111 Cocoa Lane.

Q. Went to 2111 Cocoa Lane?

A. That is correct.

Q. All right. You went straight there?

A. Yes, sir.

Q. What did you do when you got there, did you talk with anyone?

A. Upon arrival we were met by a colored female later identified as Joyce Hayden, she answered the door. We informed her that we had information and believe that a holdup man had ran into her home. She admitted us to the house and we immediately began a search of the inside.

Q. All right. And what did you find if anything?

A. On the second floor we found a colored man lying in bed dressed in white shorts and a T shirt.

Q. Who was that?

A. He was later identified as Bennie Joe Hayden.

[fol. 51] Q. All right. Do you see him in court?

A. I do.

Q. Point to him, please.

A. Right there.

Q. Indicating the defendant Bennie Joe Hayden. You say he was lying in underwear and shorts?

A. In the second floor bedroom rear.

Q. All right. Go ahead. What did you do?

A. Well, we immediately began a search in the home. We saw no other person, no other male in the home. We placed him under arrest, called for the cruising patrol, of course, and then we began a search for weapons and for any money.

Q. All right. What did you find in the home?

A. Upon searching the basement of 2111 Cocoa Lane we found the described list of articles.

Q. Did you find any weapons?

A. Yes, we did.

Q. All right. Well, what weapons did you find and where were they located in the home?

A. As to the weapons: one P 38 German automatic Luger.
[fol. 52] Q. All right. Let me show you State's Exhibit Number 1 for identification, and ask you if this is a P 38 Luger you—

A. Yes, it is.

Q. Where did you find it in the home?

A. That was located in the toilet bowl tank in the bathroom.

Q. Toilet bowl tank in the bathroom?

A. The water tank, yes, sir.

Mr. White: At this time, Your Honor, we would like to offer it in evidence.

(Thereupon the afore-mentioned gun, heretofore marked State's Exhibit Number 1 for identification, was then marked in evidence.)

By Mr. White:

Q. Go ahead, what other weapons did you find?

A. Also one L. C. Smith 12 gauge sawed-off shotgun, serial number—

Q. Is this the L. C. Smith sawed-off shotgun you found?
[fol. 53] Q. Where was this found?

A. This was also in the tank of the toilet in the bathroom.

Mr. White: We will offer this, Your Honor, as State's Exhibit Number 4.

(The afore-mentioned shotgun was then marked State's Exhibit Number 4)

By Mr. White:

Q. Go ahead, what else?

A. A loaded clip of a P 38 ammunition was found under the mattress of where Bennie Joe Hayden was sleeping.

Q. All right, loaded clip for that P 38?

A. That is correct.

Q. And that is this clip here?
A. Yes, sir.
Q. Was anything inside the clip?
A. Yes, sir.
Q. You say it was loaded?
A. Yes, sir, it was.
Q. With what?
A. P 38 shells.
[fol. 54] Q. All right. And we have those, are these the shells we have wrapped up here?
A. Yes, sir.

Mr. White: We offer these in evidence, Your Honor, the clip with the shells, State's Exhibit Number 5.

(The afore-mentioned 38 clip and shells were then marked State's Exhibit Number 5)

By Mr. White:

Q. Go ahead, Officer.
A. Upon searching several 12 gauge shotgun shells were also found in the bureau drawer located in the bedroom.
Q. These are the shells you have in this bag here, 12 gauge shotgun shells you found?
A. Yes, sir, that is it.

Mr. White: We will offer those in evidence, Your Honor, as State's Exhibit Number 6.

(The above-mentioned shells were then marked State's Exhibit Number 6)

By Mr. White:

Q. Go ahead.
A. A further search where the ammunition, the P 38 am-
[fol. 55] munition was found under the mattress also a light colored cap.
Q. Is this the grey cap here?
A. Yes, sir.

Q. It was offered for identification before as State's Exhibit Number 3.

A. Yes, sir.

Mr. White: All right. We will offer this into evidence at this time, Your Honor, the cap.

(The above-mentioned cap, heretofore marked as State's Exhibit Number 3, was then marked in evidence)

By Mr. White:

Q. Go ahead.

A. And a man's dark brown sweater, size 42, was also found with the cap.

Q. Under the mattress?

A. Under the mattress.

Q. This sweater here?

A. Yes, sir.

Mr. White: We will offer that in evidence as State's Exhibit Number 7.

[fol. 56] (The afore-mentioned sweater was then marked State's Exhibit Number 7)

By Mr. White:

Q. Go ahead, find any other clothing?

A. In the basement found in the washing machine, which was not in operation, a man's dark waist jacket, waist length jacket, size 42. A man's dark pair of trousers with the belt still in same were found in the washing machine.

Q. All right, show you these two items of clothing, the jacket and the trousers and ask you if these are the items that you are referring to?

A. Those are the ones we recovered from the washing machine, yes, sir.

Mr. White: We will offer this jacket and trousers as State's Exhibit Number 8.

(The above-mentioned jacket and trousers were then marked State's Exhibit Number 8)

By Mr. White:

Q. All right, anything else?

A. That was all that was as far as we could—all the evidence we could find.

[fol. 57] Q. Did you find anything in the way of any communications or telegrams, letters or anything like that?

A. Yes, sir, the telegram was, when he was booked at the Northwest station and booked, a telegram was taken off his person.

Mr. Freedman: Objected to.

By Mr. White:

Q. A telegram was taken off his person.

The Court: Why?

Mr. Freedman: A telegram.

The Court: Well, I don't know.

By Mr. White:

Q. Well, let me show you this and ask you if this is, did you see this? Excuse me, let me show it to counsel first?

Mr. Freedman: No, I don't know what you are talking about. I don't know what they expect to prove by it but I object to it, Your Honor. You can see it is some bill or something.

By Mr. White:

[fol. 58] Q. Is this the telegram you found on his person?

A. Yes, sir, that is the telegram.

Mr. White: Well, we will let Your Honor see it and I will offer it as State's Exhibit Number 9, offered merely to show motive, Your Honor.

The Court: This is March 12th, 1962.

Mr. Freedman: I don't know what bearing it has, but whatever—

The Court: I don't either, I will overrule the objection.

(The above-mentioned telegram was then marked State's Exhibit Number 9.)

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[fol. 60] Cross examination.

By Mr. Freedman:

Q. Now, Officer, you informed him what he was being charged with, is that right?

A. Yes, sir.

Q. And what did he say to you to try to prove his innocence, what did he say to you?

A. Just says, as I repeated before, that he did not leave the house, he went to bed early that night and was not awake, did not know anything until we woke him up that night.

• • • • • • • •

[fol. 62] Q. What else did you look for in the house when you were doing all this searching?

A. Naturally when it is a holdup you look for a weapon.

[fol. 63] Q. What else?

A. Money.

Q. Of course, you haven't mentioned that until now. You were looking for the money, you knew that $363 had been robbed from this man, you knew that, didn't you?

A. How did I know this, until I went to 2111 Cocoa Lane. I had not even seen the complaint.

Q. Hadn't you heard the man had been robbed?

A. I had not got to the Diamond Cab yet.

Q. You heard the man had been robbed, didn't you?

A. Definitely.

Q. You heard that money had been taken from the man?
A. No, sir, we don't get that information over the radio.
Q. Well, why were you looking for money then?
A. You assume—

The Court: Well, he didn't say he was looking for money, he was looking for anything he could find.
Mr. Freedman: Just now said he did.
The Court: Including money.

[fol. 64] By Mr. Freedman:

Q. Now he says he was looking for money?
A. Yes.
Q. Well, you were looking for money, weren't you?
A. Not exactly, looking for a weapon mostly.
Q. Were you looking for money?
A. Whatever we would find.

Mr. White: Did you find any money?
Witness: No, no.

By Mr. Freedman:

Q. That is right. Did you look in his pants?
A. We looked everywhere.
Q. And you found no money?
A. That is right.
Q. How many officers came in the house, about ten or twelve of you, weren't there, rushed into the house, eleven or twelve?
A. I wouldn't say ten or twelve, no, sir.
Q. How many?
A. Maybe five or six.
Q. Yes. And they searched the house from top to bot-
[fol. 65] tom, didn't they?
A. Which is customary when you receive a call like that.
Q. I am not complaining, just asking you. And how much money was found if any at all?

A. I don't believe there was any money found on the gentleman.

Q. That is right, and he said he never had robbed the man, he was not the man, didn't get any money, and he had been in the house all night sleeping in bed, isn't that right?

A. That is what he said.

Q. Yes, his wife told you the same thing, isn't that right?

Mr. White: That is objectionable, your Honor.

Mr. Freedman: In his presence.

Mr. White: She can't testify.

Mr. Freedman: She will testify.

By Mr. Freedman:

Q. She told you the same thing, didn't she?

Mr. White: Objection.

[fol. 66] The Court: Well, I will sustain the objection.

By Mr. Freedman:

Q. All right. And he protested his innocence and said he knew nothing about this robbery?

A. He did.

Q. Now, then, the only thing you know about this sweater is that you found it in the house, isn't that right?

A. Under the mattress.

Q. Under the mattress. What does that prove?

A. You keep your sweater under the mattress?

Q. What does it prove to you?

Mr. White: Your Honor, if he wants to know what it proves I can tell him.

The Court: I will sustain the objection to the question.

By Mr. Freedman:

Q. You found the cap and the uniform. Did you find this?

A. That was located, yes, sir, in the washing machine.

[fol. 67] Q. All right. What color would you say that is black, what color is that?

A. Dark blue to me.

Q. Blue? Wouldn't you say it is black? You have got good eyes.

A. So it is dark black—so it is black.

Q. Black, so it is black. Now, then, as a matter of fact—just for the record, not that it makes much difference, wasn't this gun found in the closet, this gun?

A. No, sir, I explained where the gun was, I testified as to where the gun was found.

Q. I see.

Now, did you question Hayden and ask him where he got these guns and why he had them?

A. Certainly.

Q. Explain to the Court.

A. He denied any knowledge of how the guns got into the tank or the toilet. He didn't even know they were there.

Q. You mean on the second floor?

A. In the bathroom, yes, sir.

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[fol. 71] BENNIE J. HAYDEN.

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Direct examination.

By Mr. Freedman:

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[fol. 78] Q. Explain how you got those guns, when you got in possession of them and what you know about them. Tell His Honor Judge Manley.

[fol. 79] A. Well, the night before a fellow brought me home and his car broke down in front of my house. A police officer pulled up right beside the car and got out and asked the fellow for his driver's license and registration card because of the fact he did not have his front tag on. And he couldn't get the car started. He asked me to take

the guns into my house because the fact he had to catch a cab back home. I took the guns into my house. I went straight into the bathroom with them in a bag. This time my wife came up the stairs, that is when I put them in the tank to keep them while they were in the house.

The Court: You left them in the bag, did you?
Witness: No, sir, I took them out of the bag.

By Mr. Freedman:

Q. You put them in the tank, didn't want your wife or children to see them, is that right?

A. Yes, sir.

Q. So your wife didn't know you had placed them there, is that right?

A. That is correct, sir.

[fol. 80] Q. Yes.

Now, then, do you have a greenish grey uniform as described by Mr. McGuirk?

A. No, sir, I don't.

Q. And are these your clothes that were taken from your home, is this your suit of clothes?

A. It looks like them, that is them.

Q. Now, would you call that greenish grey or black?

A. I would call it black.

Q. It is a black suit, is that right?

A. That is correct.

Q. Yes. Now, when you were taken into custody, in the course of your conversation with the police, did you make any—did they accuse you of being the man that had perpetrated this crime, did they, when you were first accused that you were the robber in this case?

A. Well, when they first took me up they apparently make it look as if I was hiding someone in my house; but then when we got to the station house they charged me with it.

[fol. 82] Q. What did they find under your bed, how [fol. 83] about the sweater they talk about?

A. They said they found a sweater under the mattress but this is not so because when I went in the house the night before—

Q. Yes.

A. —I took my sweater off and put it at the foot of the bed, and when they told me to get up I threw the spread back and due to all the excitement I couldn't find it because it was balled up in the spread.

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[fol. 84] Cross examination.

By Mr. White:

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[fol. 86] Q. I see. Well, you got his name, didn't you?

A. I know his name.

Q. Yes. Well, where is he now?

A. No one asked me for him up to now.

Q. What is his name, where does he live?

A. Joe Miller.

Q. Joe Miller?

A. That is right.

Q. Where does Joe Miller live?

A. 1904 Patterson Park.

Q. 1904 Patterson Park?

A. That is right.

* * * * * * *

[fol. 87] Q. Well, did you inform anybody else to have him here?

A. No, I did not.

Q. Why not, didn't you think he was important?

A. No, I can't say that.

Q. Now, when the police asked you about guns at first you denied any knowledge of them, didn't you?

A. I told the police the guns didn't belong to me, I didn't lie.

* * * * * * *

[fol. 91] Q. Does this man Joe Miller work for the [fol. 92] Molasses company?

A. No, sir, he was a gypsy driver. He worked for outfit in Pennsylvania, from Berryville.

Q. A gypsy driver?

A. He worked for another company.

Q. Well, how were you riding, how did it come about he brought you home, were you coming home from work the night before when he gave you the guns?

A. I was coming from the union hall.

Q. Oh, from the union hall?

A. Yes, sir.

Q. And you say the policeman stopped him because of some trouble?

A. No, the policeman, that is the reason he stopped because the car was sitting in the middle of the street, more or less, and he didn't have a front tag on.

Q. Oh, I see, it is the front tag. And where was that, at your house?

A. Sitting in front of my house, that is right, sir.

Q. And was there a policeman come along?

A. He pulled up there and stopped and asked him for [fol. 93] his driver's license and registration card because he didn't even know anything was wrong with the car because of the fact there was no tag on the car, that is the reason he stopped.

Q. I see. You don't know who that policeman was?

A. No, sir, I don't.

Q. And you say he left the car there?

A. Yes, sir, he couldn't get his car started, I had to push it to the curb.

Q. Then he went home in a taxicab?

A. Yes, sir.

* * * * * * *

[fol. 94] Q. This telegram that has been offered in evidence, did that have relation to your automobile?

A. No, sir.

Q. That was some other money you owed?

A. Yes, sir, that was the $10 that I just said I left home [fol. 95] for this payment.

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JOYCE A. HAYDEN.

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Direct examination.

By Mr. Freedman:

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[fol. 97] Q. All right. Now, when did you awaken?

A. Well, that morning it was a lot of banging at the doors.

Q. Were you asleep?

A. Yes, I was, and I woke up first, it frightened me. It was so loud, it was coming from all three of the doors.

Q. Yes.

[fol. 98] A. So, I jumped out of the bed.

Q. Where was Bennie then?

A. He was in bed.

Q. Was he awake or asleep?

A. He was asleep. I jumped out of the bed and I ran downstairs and I opened one door, and there were these officers. So, one of them said, did a holdup man just run in here?

Q. How many officers were there?

A. At the door that I opened there were about four or five.

Q. Yes.

A. And I said, no. But didn't say nothing else, just came in the house and started going through the house. So it was banging at the other doors, I went and opened the back door and some more came in. So, they went upstairs and

by that time the children were crying. They had just woken up, they were crying.

Q. Were they in the same room you were in?

A. No, they were in different rooms.

Q. Different rooms?

[fol. 99] A. I rushed up the steps to the children and when I got in there, there were some officers were in there talking to them, and they were crying, and some was talking to my husband, some started asking us questions, if my husband had been home all night, whether someone had came in the house. I told them no one had came in the house and my husband was home all night. So they asked my children questions, my five year old son, if his father had just came in the house or if he had been home all night. So, finally they kept talking to my husband, and they were still going all through the house looking at everything. And so they took my husband away from the house, and about fifteen or twenty minutes later some more came back and they questioned me.

Q. What did they question you, what did they ask you?

A. They asked me if my husband—

Mr. White: I object.

Mr. Freedman: Wait a minute.

Mr. White: This is not admissible.

Mr. Freedman: Why isn't it? The questions the officers [fol. 100] asked her.

The Court: Well, I think I will allow it in, Mr. White, I will overrule the objection.

By Mr. Freedman:

Q. Tell His Honor, don't say they questioned me, say what they said to you and what you said to them, Mrs. Hayden, and please don't be nervous and crying, you will be all right.

A. They asked me if my husband had been home all night and I told them yes. They asked me did anyone else live

in the house. I said no. They asked me if my husband owned any guns. I told them no because I had never known my husband to own any guns. So they kept looking and everything. And when they searched the first time I kept asking them what they were looking for and they wouldn't tell me. But the second time they came back I asked one of the officers what was he looking for, and he said money. So I said, you have no search warrant, you have no right to be in here tearing my things apart like this. And one of them told me to shut up or he would lock me up. So, then, [fol. 101] they just searched everywhere and then they left.

Q. They told you they were searching for money?

A. Yes, they did.

Q. Yes. Did they find any money?

A. No.

Q. Did you see any money in the house?

A. No.

Q. When was the first time you knew anything about the gun, about the guns that they found?

A. I didn't. When they asked me did my husband own any guns I said no.

Q. When was the first time, you saw these guns here, didn't you?

A. Yes.

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[fol. 105] Cross examination.

By Mr. White:

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[fol. 107] Q. And you didn't notice anything unusual in the bathroom between 9:30 and 11:30?

A. No, sir, I did not.

Q. I see.

Mr. White: All right. That is all.

By the Court:

Q. Had you used the toilet?
A. Yes, sir, we used the toilet.
Q. After the guns had been put in there?
A. Yes, sir.
Q. You say he came home about 9:30 the night before?
A. That is right.

The Court: All right.

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[fol. 115] Off. Edwin Duke.

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Direct examination.

By Mr. White:

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[fol. 116] Q. Are you the police officer who actually took possession of the weapons that were offered into evidence?
A. Yes, sir.
Q. All right. Now, with respect to State's Exhibit Number 1, this P 38 Luger, did you actually find this on the premises?
A. Yes, sir, I found that in the bottom of the flush tank in the bathroom.
Q. I see. Was there water in the tank or not?
A. Yes, sir.
Q. There was water in the tank?
A. Yes, sir.
Q. All right. Now, how about State's Exhibit Number 4, the sawed-off shotgun?
[fol. 117] A. The shotgun was also in the tank, it was resting on the float in the tank.
Q. I see. Was there anything unusual about the toilet?
A. Yes, sir. I heard it running, that is why I looked in there.

Q. I see. It was running?

A. Yes, sir.

Q. Did it continue to run after you took the guns out?

A. No, sir, it stopped running when I took the shotgun off the top of the float.

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[fol. 123] Mr. White: The State's case in rebuttal.

Mr. Freedman: That is the case and renew our—

The Court: Has any effort been made to get Joe Miller here?

Mr. Freedman: Your Honor, the first I heard of it. I [fol. 124] don't know anything about it, in fact. My client thought that wasn't important apparently; apparently wasn't important.

The Court: I know the police did not because they knew nothing about it because their testimony was that the defendant said he knew nothing about the guns and did not know how they got in the tank. All right.

Well, you are satisfied, are you, I just want to—

Mr. Freedman: That is all we can do.

The Court: I just want to say that if you want to be given an opportunity to get this witness in and get any benefits that you may derive from his testimony, I am offering at this time to postpone the case until he can be brought in. The reason I am doing that is so there will not be any claim made later by the defendant that, in the event he is found guilty, that he did not have the opportunity to produce his witnesses.

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[fol. 132] EARL J. MILLER

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Direct examination.

By Mr. Freedman:

Q. Mr. Miller, how old are you?

A. 28.

Q. And did you formerly live at 1904 Patterson Park Avenue?

A. Yes sir.

Q. But, at the time of your arrest you gave the address of 923 Rutland Avenue, is that right?

A. Yes, sir, that is the house.

Q. That is the address you were known to reside in at the time of your arrest in the case in which you are now serving sentence?

* * * * * * *

[fol. 134] Q. And on March the 16th, 9:00 p.m., did you have occasion to have your car in front of his house?

A. I was around the corner from his house and my car cut off.

Q. And you couldn't drive it, is that right?

A. That is right.

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[fol. 135] Mr. Freedman: What happened.

The Court: That is what he is telling.

Mr. Freedman: Yes, sir.

The Court: Tell us what the occurrence was.

Witness: Well, see, it was on Pennsylvania Avenue I left, I was going out towards Reisterstown Road, so I turned off at Carolina and North Avenue and I turned up through Poplar Grove Avenue and made a right turn at the corner. That is when it cut off, the car cut off, the lights and everything went out. So I pulled it to the curb, and a taxicab pull up behind me and I called and he asked me what was wrong? And I said it wouldn't run, almost back out in the street, in the front end, so we got there and tinker with it, and he said, your voltage regulator has gone up. And he then said he was checking in, so he couldn't [fol. 136] do any more. So I pulled the car to the curb, closer to the curb a little better. And, I thought about the two guns I had in the car. So I thought what I would do with them because I take a taxicab home.

By the Court:

Q. You mean you said to the cab driver?

A. I didn't say anything to him. He left. So I just left myself then. So I thought about what will I do about the two guns, I will catch another cab across town. So I thought about his house on the corner. I walked around there and called him to the door and asked him would he keep something for me until the next day. So he said okay, asked me what it was and I told him. He said, sure. And the next day when I went over there about 4:00 o'clock wasn't anybody at home. So I found out what had happened after I went back down Pennsylvania Avenue.

Cross examination.

By Mr. White:

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[fol. 148] Q. And when you got there who was home?

A. He was there.

[fol. 149] Q. Was his wife there?

A. The kids were there, somebody, I didn't go in, just stood at the door and told him I wanted him to keep something for me until tomorrow.

Q. Yes. You didn't see his wife, did you?

A. No, sir.

Q. Well, what work were you doing at the time?

A. I was longshoreman.

Q. And what was Hayden, do you know what his work was?

A. He was driving a tractor and trailer, I think he said, a molasses truck.

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[fol. 150] STATEMENT OF THE COURT

The Court: Well, we have evidence in this case of the positive identification of Hayden by John Falls and James Waters as being the man that they saw running away from the Diamond Cab Company cage at a time when they heard

voices saying, holdup or there he goes, get him; and, a man walked right in front of Waters. He not only identified him in the lineup but both he and Falls identified him here in court.

I think I could reasonably infer that the man they saw running away from the Diamond Cab was the man that perpetrated the holdup.

Now, Falls drove in his taxicab, followed the man, and saw him go into the house at 2111 Cocoa Lane. The other man Waters, he went to the rear of Cocoa Lane and did [fol. 151] not see anyone go out from the rear or didn't see anyone go in the house from the rear. So the question is whether Hayden is the person that the police found in the house when they got there.

I might say also that McGuirk testified that the man that assaulted him had on a truck driver's uniform. Falls said he had a dark greyish cap and a uniform of some kind. The other man said he had a two piece suit on.

When the police went in they found Hayden in bed. They found the cap, and I think it was a greyish cap. You had it here in court.

Mr. White: Yes, Your Honor.

The Court: Well, possibly, they found the cap and the jacket and the trousers in the washing machine in the basement; although I thought one of the officers had said that the cap was found under the mattress.

Mr. White: Under the mattress, that is correct, sir.

The Court: Under the mattress, found under the mattress the loaded clip. They found the two piece uniform [fol. 152] or the suit that he was wearing, in the washing machine in the basement. When the policeman went into the children's room the boy said that his father had just come in the house.

Mr. Freedman: Well, now, that was stricken out, Your Honor.

The Court: No, it wasn't stricken out, that was the testimony of Mrs. Hayden, the wife. The testimony of the wife was that Hayden came home at 9:30 the night before. But, that is still in evidence, the statement of Mrs. Hayden, that the boy said that his father had just come in the house.

The pistol and the sawed-off shotgun were found in the toilet bowl tank in the bathroom. Hayden explains that by saying that when Miller gave him the guns the night before, that he took them upstairs in the bathroom and that his wife came up; and to prevent the wife from seeing them, because she had told him that she wouldn't allow any guns around the house, he stuck them down in the toilet bowl to hide them from his wife. But, I do not have to accept that as correct, I have the right, I would think, to infer from [fol. 153] the testimony that if I find that Hayden was the man who committed this holdup and ran into the house, that in his hurry to get rid of the guns, that he put them in the toilet at that time. And, I think that would be more consistent because the wife had said that they used the toilet during the night and if the guns had been in there they certainly, overnight, they certainly would have discovered their presence there in the operation of the toilet.

There is an inconsistency in the defendant's testimony with respect to the manner in which he obtained these guns. He testified that a man brought him home the night before and the man had trouble with his car and asked him to keep the guns for him because he did not want to take them with him riding home in a taxicab. But, Miller tells us a different story. He tells us that Hayden was not with him when his automobile conked out. He was by himself, and the automobile conked out just when he was about half a City block from Hayden's home.

I think what really happened was that Miller was on his way to Hayden's home to give him the guns, and that the [fol. 154] car just conked out when he was close to his home. Hayden says he was riding home with Miller when the car conked out. Miller just says different, says Hayden wasn't with him, and that he was by himself, and he took the guns to Hayden to keep them for him overnight.

The only missing link in the whole case is the money that was taken from McGuirk, he said $363. A lot of things could have happened to the money. It is much easier to hide away money in a place where it won't be found than

it is to dispose of guns or clothing or other things that this man attempted to dispose of, putting the clothing in the washing machine, his hat under the mattress. But, in the whole case, the fact that the State has not been able to come up with the money, it seems to me, is not sufficient to, in itself, to break down the otherwise very strong case that the State has produced.

[fol. 2]

Civil No. 14388

HAYDEN v. WARDEN

No. 10,061

Name Bennie Joe Hayden No. 7529
Address 954 Forrest Street
Baltimore 2, Maryland

M Judge Clement S. Haysworth
Street Chief Judge U.S. Court of Appeals Fourth Circuit
City Richmond 19 State Virginia

Date March 15, 1965

Dear Judge Haysworth

Inclosed please find a copie of an order denying me relief under Writ of Habeas Corpus by the Honorable Raszel C Thomsen Chief Judge United States District Court for the District of Maryland dated March 3, 1965.

It is because of this order that I am now requesting the right to appeal this order to this honorable Court in Forma Pauperis and also requesting this Court to issue a Certificate of probable Cause and appointment of Counsel, and please issue an order to the Clerk of the U.S. District Court for the District of Maryland to provide me with a Copie of the transcript of testimony at the cost of the U.S. Government, because I am a Citizen of the United States without the money to pay for these proceedings on this

appeal, and that my trial in the Criminal Court of Baltimore City in May of 1962 was not a fair trial as guaranteed by the United States Constitution. I wrote the Clerk of the District Court of Maryland and requested a Copie of the transcript of testimony in Conection with the appeal but he never answered. I also wrote Judge Thomsen and informed him that he did not make a ruling on a telegram which was also addmitted at the trial against me, the telegram was taken off my persons at the police station when I was booked for investigation, the alleged robbery occured on March 17, 1962, while the telegram was dated March 12, 1962 and it read (make payment in forty eight hours or merchandise will be repossessed) the State used [fol. 3] the telegram to show a Motive for the Crime, however Judge Thomsen did not rule on it even though the transcript of the trial and the past Conviction hearing, was filed as exhibit and the trial transcript shows on p 59 that the telegram was addmitted. While I am asking this Court to rule on all five (5) Contentions raised before Judge Thomsen and also on the use of the telegram in evidence agianst me. I want to file agian my trial transcript. and the transcript of the past Conviction hearing on March 19, 1964. My wife testified at the trial that she opened the door and the police just came on in the house after they ask her did a robber run in there? The next and only other time she ever testified was before Judge Thomsen and she testified that the police did not ask and she did not give them any permission to come in or search the house. I feel the trial transcript is evidence in itself that there was no worthwhile evidence to indict because the two cab drivers did not go before the grand jury which left only the police and the victim (Charles McGuirk) and the testimony is clear that he did not identifie me at the Magistrate hearing or at the trial. My Court appointed Counsel told me this Court would appoint me a Counsel, since I do not have any money I do not feel I have a right to request any certain Counsel but would be delighted to have Mr Skolo from the University of Virginia to present my ap-

peal. Please docket this appeal for me. A review of this order enclosed show that there is no mention of the telegram.

Respectfully Submitted

/s/ Bennie Joe Hayden
Proper Person

[fol. 16]

United States Court of Appeals

For the Fourth Circuit

No. 10,061

[Title omitted]

Order Assigning Counsel—May 31, 1965

It is ordered that Albert R. Turnbull, Esquire, of Norfolk, Virginia, be, and he is hereby, assigned as counsel to present the appeal of Bennie Joe Hayden in the above-entitled case.

May 31, 1965.

Clement F. Haynsworth, Jr., Chief Judge, Fourth Circuit.

[File endorsement omitted]

[fol. 28]

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 10,061

BENNIE JOE HAYDEN, Appellant,

vs.

WARDEN, MARYLAND PENITENTIARY, Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore.

Upon consideration of the petition of the appellant, by his counsel, and for cause shown,

Leave is hereby given to the appellant to comment on the case of *People* v. *Thayer*, decided by the Supreme Court of California on December 6, 1965, and allowed to be cited by the appellee as additional authority in the above-entitled case by order dated December 23, 1965.

January 26, 1966.

Simon E. Sobeloff, United States Circuit Judge.

Filed Jan. 27, 1966.

Maurice S. Dean, Clerk

A true copy,

Teste:

Maurice S. Dean, Clerk, U. S. Court of Appeals for the Fourth Circuit.

By Margaret M. Walton, Deputy Clerk.

(Seal)

[fol. 29]

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 10,061

BENNIE JOE HAYDEN, Appellant,

versus

WARDEN, MARYLAND PENITENTIARY, Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore.

Roszel C. Thomsen, District Judge.

(Argued October 8, 1965.)

(Petition for rehearing en banc denied June 3, 1966.)

Before Sobeloff, Boreman and Bryan, Circuit Judges.

OPINION—April 21, 1966

Albert R. Turnbull (Court-assigned counsel) [Fine, Fine, Legum, Schwan & Fine on brief] for Appellant, and Franklin Goldstein, Assistant Attorney General of Maryland, (Thomas B. Finan, Attorney General of Maryland, on brief) for Appellee.

[fol. 30] SOBELOFF, Circuit Judge:

Appellant Hayden is serving a sentence of fourteen years in the Maryland Penitentiary, having been convicted and sentenced in the Criminal Court of Baltimore City in

June, 1962, for robbery with a deadly weapon. After a hearing in the District Court on his application for a writ of habeas corpus, relief was denied, and from this action an appeal was taken.

In this court the petitioner's basic contention is that certain evidence admitted at trial was the product of an unconstitutional search and seizure. The state maintains that the search and the seizure were lawful, and urges further that, even if unlawful, petitioner has waived his right to raise the issue in the federal courts because of his failure to object at trial, failure to appeal from the conviction, and withdrawal of his appeal from the state court's denial of post-conviction relief.

I

An armed robbery occurred at eight o'clock on the morning of March 17, 1962, on the premises of the Diamond Cab Company in Baltimore. Two cab drivers saw a man running from the scene and heard shouts of "hold up, stop that man." The cab drivers, proceeding independently, followed the suspected robber to 2111 Cocoa Lane. One of the drivers actually saw him enter the house. The police were immediately notified and in a few minutes arrived at that address. They had been told that the offender was a Negro about 5'8", 25 years old, and wore a light cap and dark jacket.

[fol. 31] The police knocked at the door and Hayden's wife answered. The officers told her that they had information that a holdup man was in the house. There is some dispute as to whether or not Mrs. Hayden objected to the entry of the officers. However this may be, several officers entered and went to all three floors, and when no man other than Hayden was found in the house, they arrested him. They seized a sawed-off shotgun and a pistol which they found in the flush tank of the toilet, some ammunition, a sweater, and a dark gray cap, found under Hayden's mattress, shotgun shells lying in a bureau drawer, and a

man's jacket and trousers with a belt, discovered in a washing machine in the basement. The police, however, found no stolen money.

The seized items were admitted in evidence without objection by the defendant's retained counsel. The clothing was used to fix the identity of Hayden as the man seen running from the scene of the crime and into 2111 Cocoa Lane.

Hayden failed to appeal his conviction, but upon his confinement in the Maryland Penitentiary he promptly petitioned the state court for relief under the Maryland Post-Conviction Procedure Act. Relief was denied without the taking of testimony. On appeal from this action the Maryland Court of Appeals remanded the case for an evidentiary hearing with respect to the challenged lawfulness of the search and seizure. After testimony, the post-conviction judge again denied relief, holding "that the search of his home and seizure of the articles in question were proper."

Thereupon, Hayden applied for leave to appeal to the Court of Appeals of Maryland. Before his application was acted upon, however, he requested its withdrawal. The [fol. 32] request was granted.[1] He filed the instant habeas corpus petition three months later. His right to appeal to the Court of Appeals of Maryland is now barred by time.

II

A. We deal first with the failure of trial counsel to make a contemporaneous objection to the admission of the seized articles. The state contends that the failure to object at trial constitutes a waiver by Hayden of his right to assert the constitutional claim in a federal habeas corpus proceeding. In order to preclude consideration of the constitutional claim on federal habeas corpus the state must show

[1] In the meantime, during the pendency of his application for state post-conviction relief, Hayden had filed two habeas corpus petitions in the federal District Court, both of which had been denied for failure to exhaust available state remedies.

that Hayden, acting through his attorney, voluntarily relinquished a known right by failing to object at trial[2] and that the failure to object constitutes an independent and adequate state ground. See *Henry* v. *Mississippi*, 379 U.S. [fol. 33] 443, 452 (1965), *relying on Fay* v. *Noia*, 372 U.S. 391, 438-39 (1963).[3] See also *Dillon* v. *Peters*, 341 F.2d 337, 339 (10th Cir. 1965).

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[2] The state in its brief speculates that the failure to object was a tactical maneuver on the part of Hayden's trial counsel. The state attributes to him a deliberate purpose to allow the admission of the clothing, so that he might create a reasonable doubt in the minds of the jurors by arguing to them that the police officers conducted a more than usually thorough search and yet were unable to find any stolen money. Hayden's trial counsel, however, testified in the District Court habeas hearing that he did not object because he was under the impression that the arrest and the search were lawful and thought the articles could not be excluded. Aside from the fact that there is a total absence of testimony to support the state's hypothesis, the tactical maneuver postulated by the state is wholly unrealistic, for the lawyer could have laid a foundation for the same argument to the jury by cross-examination of the police officers. The argument would have been readily available without subjecting the defendant to the damage obviously resulting from the admission of the clothing.

[3] In *Henry*, a case coming to the Supreme Court on direct appeal from a state conviction, it was said:

> "* * * a dismissal on the basis of an adequate state ground would not end this case; petitioner might still pursue vindication of his federal claim in a federal habeas corpus proceeding in which the procedural default will not alone preclude consideration of his claim, at least unless it is shown that petitioner deliberately bypassed the orderly procedure of the state courts. *Fay* v. *Noia*, *supra*, at 438." 379 U.S. at 452.

And at page 447 of the *Henry* opinion the Court observed:

> "[It is settled] that a litigant's defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest."

Whether the Supreme Court has in fact abolished the "independent and adequate state procedural ground" as a basis for denying

It is unnecessary in this case to reach the question of whether Hayden voluntarily relinquished his constitutional claim, for in the state post-conviction proceedings the Court of Appeals of Maryland did not look upon the failure to object as a bar to his constitutional claim. Instead it remanded the case to the lower court for a determination of the legality of the search and seizure. *Hayden* v. *Warden, Maryland Penitentiary,* 233 Md. 613, 195 A.2d 692 (1963). Since the Court of Appeals of Maryland did not interpose [fol. 34] the failure to object as a bar to consideration of the merits of the constitutional issue, denial of state post-conviction relief cannot be said to rest on an independent state ground. The District Court was therefore not precluded from considering the constitutional question on its merits. *Cf. Henderson* v. *Heinze,* 349 F.2d 67 (9th Cir. 1965); *Nelson* v. *People of State of California,* 346 F.2d 73 (9th Cir. 1965); *Rhay* v. *Browder,* 342 F.2d 345 (9th Cir. 1965).

When the highest court of a state has declined to invoke an independent state ground and has proceeded to the merits of a federal question, it would be incongruous for a federal court to assert the state ground to shut off its review of the federal question. There appears to be no reason for a federal court to refuse to vindicate a federal claim by a more exacting insistence on state procedural requirements than the state court itself demanded. The so-called independent ground, not having been relied on by the state, is simply irrelevant.

B. With respect to Hayden's failure to prosecute an appeal from his conviction and the withdrawal of his ap-

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relief in federal habeas corpus proceedings need not, as the text will indicate, be determined in this case. For an affirmative answer to the question, as well as a penetrating analysis of Henry v. Mississippi and Fay v. Noia, see Hill, "The Inadequate State Ground," 65 Colum. L. Rev. 943, 997 (1965). *But cf.* Henderson v. Heinze, 349 F.2d 67 (9th Cir. 1965); Nelson v. People of State of California, 346 F.2d 73 (9th Cir. 1965).

plication for leave to appeal from the state post-conviction decision, the District Court determined that no such deliberate bypass occurred as would prevent Hayden from raising in the federal court the constitutional issue of illegal search and seizure. We uphold the District Court's determination. Hayden's letter to the clerk of the Court of Appeals of Maryland requesting withdrawal of his application for leave to appeal displays complete ignorance of both the judicial process and the consequences of not pursuing his [fol. 35] judicial remedies in an orderly fashion.[4] Under these circumstances we cannot find error in the District Court's determination of no deliberate bypass. See *Fay* v. *Noia*, 372 U.S. 391 (1963); *Pruitt* v. *Peyton*, 338 F.2d 859, 860-61 (4th Cir. 1964); *Hunt* v. *Warden, Maryland Penitentiary*, 335 F.2d 936, 944 (4th Cir. 1964).

III

Turning to the merits of Hayden's petition, we do not disagree with the District Court's determination that the arrest was lawful and the search conducted as an incident thereof constitutionally permissible.

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[4] Hayden's letter reads:

"Dear Mr. Young:

"I have an application for leave to appeal under the post conviction procedure act which is docketed at No. 18 Sept. term 1964. Since the opinion by Judge Sodaro is based on assertions contrary to the trial testimony which is in the trial transcript.

"After considering the opinion and the transcript I feel that this appeal is worthless since the statements in the opinion are far from being true, this being so I feel it is the wiser course to refile again in the lower State Court and since I can not have two actions pending at the same time I must withdraw my application for leave to appeal.

"I am sorry I waited so late to make up my mind but I am no lawyer and it took me quite some time to make the wiser decision.

"Your Very Truly

/s/ Bennie Joe Hayden"

A. Appellant does not strenuously contest the legality of his arrest. He concedes that the officers had probable cause to believe that a felony had been committed and that the felon was hiding in the house. There was testimony that the officers knocked on the door and announced the [fol. 36] purpose of their entry. The District Court so found the facts and concluded that regardless of the asserted lack of consent on the part of Mrs. Hayden to the entrance of the police, the officers were within their legal powers in entering in "hot pursuit" of a suspected felon.[5]

Although the appellant concedes the right of the police to conduct a search as an incident to the lawful arrest, he maintains that in its extent the search exceeded constitutionally permissible limits. The testimony showed that when the officers, approximately five in number, entered they knew only that a man suspected of robbery had run into the house. Not finding the suspect on the first floor, one officer proceeded to the basement while others went to the second floor, where they found Hayden. Learning that he was the only male in the house, the police arrested him, and conducted a search.[6] The arrest and search lasted one hour. In its extent the search did not exceed the broad limits tolerated in *Harris* v. *United States,* 331 U.S. 145 (1947), where the Supreme Court affirmed the validity of an intensive five-hour search of all four rooms of an apartment, undertaken as an incident to a lawful arrest.

B. This brings us to the principal substantive issue presented by this appeal. The petitioner contends that even if the search itself were legal, the articles of clothing seized by the police were "of evidential value only" and that under [fol. 37] the principle repeatedly declared by the Supreme

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[5] The trial judge in the state post-conviction proceeding found that Mrs. Hayden had consented to the entry of the police.

[6] It is unclear whether the clothing taken from the washing machine in the basement was procured before or after the arrest. In the view we take of the case it is unnecessary to resolve this ambiguity in the testimony.

Court, items having evidential value only are not subject to seizure and must be excluded at trial. *Gouled* v. *United States,* 255 U.S. 298, 310 (1921); *United States* v. *Lefkowitz,* 285 U.S. 452, 464-66 (1932). See also *Abel* v. *United States,* 362 U.S. 217, 234-35 (1960); *Harris* v. *United States,* 331 U.S. 145, 154 (1947). The petitioner maintains therefore that under *Mapp* v. *Ohio,* 367 U.S. 643 (1961), the admission of the articles of clothing at his state trial violated his constitutional rights.

It cannot be doubted that the proscription against seizure of articles of only evidential value is one of constitutional dimensions. *E.g., Gouled* v. *United States,* 255 U.S. 298, 310 (1921); *United States* v. *Lefkowitz,* 285 U.S. 452, 464-67 (1932).[7] In *Harris* v. *United States,* 331 U.S. 145, 154 (1947), Chief Justice Vinson, relying on the above cited cases, and others, said:

> "This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumen- [fol. 38] talities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime."

The dissenting opinions of Justices Frankfurter, pp. 155, 165-66, and Murphy, pp. 183, 187-88, 191, specifically recog-

[7] The state contends that the proscription against the seizure of articles of only evidential value is merely an exercise of the supervisory power of the federal courts and does not rise to constitutional proportions. While it is true that Rule 41(b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. § 41(b), may be interpreted to preclude such seizures, the Supreme Court has not relied on mere supervisory rules to support its decisions on this point, but has instead specifically grounded its decisions on the Fourth Amendment.

nized the distinction made by the majority between items subject to seizure and items which may not lawfully be seized. Thus, in the case dealing with the most extensive search ever validated by the Supreme Court, we find the Justices in the majority and those in dissent unanimous in condemning seizures by the police and the later use by the prosecution of articles having evidentiary value only.

The clothing in this case in no way constitutes the "means by which the crime was committed," unlike the things lawfully taken in *Abel* v. *United States,* 362 U.S. 217, 237-38 (1960) (forged birth certificate and graph paper with coded message used to conduct espionage activities); *Zap* v. *United States,* 328 U.S. 624, 629 & n.7 (1946) (cancelled check used to defraud the Government); *Marron* v. *United States,* 275 U.S. 192, 198-99 (1927) (business ledger and various bills used to operate an illegal business); *Gottone* v. *United States,* 345 F.2d 165, 166 (10th Cir.), *cert. denied,* 382 U.S. 901 (1965) (lists of names and addresses with unexplained notations, race track results, and odds sheets used to operate illegal gambling business); *United States* v. *Boyette,* 299 F.2d 92, 94-95 (4th Cir.), *cert. denied,* 369 U.S. 844 (1962) (guest checks used in the operation of a brothel). There is no contention that the articles seized here were used by the felon as a disguise.

[fol. 39] Nor did the possession of the clothing constitute a "continuing crime." Examples of types of articles the possession of which constitutes a continuing crime can be found in *United States* v. *Rabinowitz,* 339 U.S. 56, 64 (1950) (forged and altered United States postage stamps), and *Harris* v. *United States,* 331 U.S. 145, 154-55 (1947) (false selective service cards). No discussion is required to demonstrate that the clothing was neither contraband nor the fruit of the crime.

No Supreme Court case has discussed the seizure of clothing. *Cf. Kremen* v. *United States,* 353 U.S. 346 (1957) (indiscriminate seizure of the entire contents of a cabin illegal). Lower federal courts, however, have had occasion

to consider the subject. See *Morrison* v. *United States*, 262 F.2d 449, 450-51 (D.C. Cir. 1958) (handkerchief containing tangible evidence of morals offense of "evidential value only" and therefore held not subject to seizure); *United States* v. *Lerner*, 100 F. Supp. 765, 768 (N.D. Calif. 1951) (identification bracelet, and documents, "merely evidentiary materials tending to connect the defendant with the crime for which he was arrested"—harboring or concealing a fugitive—and therefore held constitutionally not seizable); *United States* v. *Richmond*, 57 F. Supp. 903, 907 (S.D. W.Va. 1944) (articles of wearing apparel useful in the identification of the defendant held not subject to seizure). *But cf. United States* v. *Guido*, 251 F.2d 1, 3 (7th Cir.), *cert denied*, 356 U.S. 950 (1958) (shoes worn by bank robber held seizable as "the means" of committing the offense); *Trotter* v. *Stephens*, 241 F. Supp. 33, 40-41 (E.D. Ark. 1965) (articles of clothing in the possession of accused rapists seizable, although court does not advert to rule prohibiting seizure of articles of only evidential value).

[fol. 40] In the case before us the articles of clothing were introduced at trial either to aid witnesses in their indentification of the defendant or to create an adverse inference by arguing consciousness of guilt from the unusual condition of the clothes in the washing machine and particularly the presence of the belt in the trousers. However compellingly suspicious the circumstances, it cannot be denied that the value of the garment was "evidential only."

The *Richmond* case, above cited, 57 F. Supp. 903, bears a remarkable resemblance to the one under consideration. There, a federal agent observed a man working at an illicit still. The following day the agent went to the defendant's home for the purpose of arresting him if it should turn out that he was the person seen at the still. The agent made the arrest, and as an incident to this lawful arrest seized several articles of defendant's clothing which were later used in evidence for the purpose of demonstrating that other clothing found at the still matched that admittedly

belonging to the defendant. The court concluded that even while the search itself was reasonable, the clothing it produced was of evidential value only and hence constitutionally immune from seizure.

The state stresses the fact that before entering Hayden's house, the police officers had been given a brief description of what the suspect was wearing, and that the articles of clothing seized provided a strong link in the prosecution's case against Hayden. But the potency of the evidence to convict was not accepted in *Gouled* as justification for its admission. 255 U.S. at 310. In that case neither the officers' foreknowledge of the existence of the article seized, nor the prior issuance by a judicial officer of a search warrant [fol. 41] describing the item served to validate the taking of "evidential" material. 255 U.S. at 307.

We recognize that the search conducted by the officers was lawful; but the law imposes limitations on the types of articles which agents of Government may seize either in the execution of a search warrant or in connection with a lawful arrest. A succinct explanation of the underlying constitutional principle was provided by Judge Learned Hand:

> "[I]t is only fair to observe that the real evil aimed at by the Fourth Amendment is the search itself, that invasion of a man's privacy which consists in rummaging about his effects to secure evidence against him. If the search is permitted at all, perhaps it does not make so much difference what is taken away, since the officers will ordinarily not be interested in what does not incriminate, and there can be no sound policy in protecting what does. Nevertheless, *limitations upon the fruit to be gathered tend to limit the quest itself* * * *." *United States* v. *Poller*, 43 F.2d 911, 914 (2d Cir. 1930) (Emphasis added.)[8]

[8] This passage was cited with approval in United States v. Rabinowitz, 339 U.S. 56, 64 n.6 (1950). See also Comment, "Limitations on Seizure of 'Evidentiary' Objects—A Rule in Search of

From time to time the line has wavered in the adjudication of the lawfulness of searches, but in no instance has the Supreme Court faltered in its adherence to the distinc-
[fol. 42] tion so clearly enunciated by Judge Hand between what may and what may not be seized in a lawful search.[9]

Nor do we perceive any rational distinction between private papers that are of only evidential value and articles of clothing of the same character. The Fourth Amendment guarantees that "the right of the people to be secure in their persons, houses, *papers, and effects* against unreasonable searches and seizures, shall not be violated." (Emphasis added.) Papers of only evidential value are not the sole items immune from seizure.[10]

Reason," 20 U. Chi. L. Rev. 319, 327 (1953), which Professor McCormick has praised as "acute" and "extensive." *McCormick on Evidence*, § 139 n.1(b), p. 294. *But cf.* Comment, "Eavesdropping Orders and the Fourth Amendment," 66 Colum. L. Rev. 355, 367 (1966).

[9] See Gouled v. United States, 255 U.S. 298, 310 (1921); Marron v. United States, 275 U.S. 192, 198-99 (1927); United States v. Lefkowitz, 285 U.S. 452, 464-66 (1932); Davis v. United States, 328 U.S. 582, 587-89 (1946); Zap v. United States, 328 U.S. 624, 629 (1946); Harris v. United States, 331 U.S. 145, 154 (1947); Trupiano v. United States, 334 U.S. 699, 704 (1948); United States v. Rabinowitz, 339 U.S. 56, 64 (1950); Abel v. United States, 362 U.S. 217, 234-35 (1960); Shellow, "The Continuing Vitality of the *Gouled* Rule: The Search for and Seizure of Evidence," 48 Marq. L. Rev. 172, 175 (1964).

[10] The state argues that the exclusionary rule made applicable to the states by Mapp v. Ohio, 367 U.S. 643 (1961), should be applied only to items seized pursuant to an *unlawful* search, and not to things illegally seized in the course of a search which is itself not unlawful. We find no basis in reason or authority for such a distinction. In state as well as federal jurisdictions, the proscription against seizure of articles having only evidential value is a proscription grounded on the Fourth Amendment. The Supreme Court has made it abundantly clear that the due process clause of the Fourteenth Amendment requires that all evidence seized in violation of the Fourth Amendment shall be excluded at state trials. See Beck v. Ohio, 379 U.S. 89 (1964); Aguilar v. Texas, 378 U.S. 108 (1964); Comment, "Search and Seizures of 'Mere

We are mindful that eminent judges and scholars have challenged the correctness and wisdom of the rule that precludes the seizure and admission in evidence of articles having evidential value only, even if the search which produced [fol. 43] them was itself reasonable and lawful. Chief Justice Traynor has sharply critized the rule as "an unfortunate * * * legal absurdity" and has argued further that it is not of such fundamental importance as to be applicable to the states through the Fourth and Fourteenth Amendments. *People* v. *Thayer,* 408 P.2d 108, 109 (Sup. Ct. Cal. 1965).[11] Chief Justice Weintraub, while expressing doubt that the states have leeway to adopt a rule for search at variance with the federal rule fashioned by the Supreme Court, reasoned that shoes with distinctive heels worn by the defendant while committing an armed robbery were an instrumentality of the crime and could be searched for and seized under a warrant specifically describing them. *State* v. *Bisaccia,* 213 A.2d 185 (Sup. Ct. N.J. 1965). Directly confronting the mere evidence rule, Chief Justice Weintraub argues cogently that "things may be seized for their inculpatory value alone and that a search to that end is valid, so long as it is not otherwise unreasonable * * *." 213 A. 2d at 193. Even so staunch an exponent of "individual liberties" as Professor Kamisar has criticized the rule as "unsound and undesirable." Kamisar, "Public Safety v. Individual Liberties: Some 'Facts' and 'Theories,'" 53 J. Crim. L., C. & P. S. 171, 177 (1962). See also Comment, "Eavesdropping Orders and the Fourth Amendment," 66 Colum. L. Rev. 355, 370 (1966). *But cf.*

Evidence'—Amendment to Or.Rev. Stat. Sec. 141.010—Effect on Prior Law and Constitutionality," 43 Ore. L. Rev. 333, 346-49 (1964). *Cf.* Ker v. California, 374 U.S. 23, 34 (1963).

[11] Chief Justice Traynor, though expressing doubt as to the wisdom of the rule, held that the medical records under consideration were actually instruments of the crime—fraud in billing for welfare services—thus characterizing the disputed records as within a traditionally recognized category subject to seizure. As already pointed out, it cannot be maintained that this characterization could apply to the clothing in our case.

Note, "Evidentiary Searches: The Rule and the Reason," 54 Geo. L. J. 593 (1966).

[fol. 44] Judges, aware of the practical problems faced by police officers and prosecutors in the performance of their duties, have sometimes strained mightily to overcome the exclusionary effect of the mere evidence rule by stretching to the point of distortion the category of "instrumentalities of crime," in order to achieve the admission in evidence of articles manifestly of evidential value only. For example, in *United States* v. *Guido*, 251 F.2d 1 (7th Cir.), *cert. denied*, 356 U.S. 950 (1958), it was broadly declared that shoes could be an instrumentality of crime, for a robber could hardly facilitate escape if he was "fleeing barefooted from the scene of the hold-up." 251 F.2d at 4. While the result in a particular case may not be unreasonable, it can hardly be squared with the pronouncements of the Supreme Court. See Note, "Evidentiary Searches: The Rule and the Reason," 54 Geo. L. J. 593, 610 n.106 (1966).

While we recognize that the rationale of the rule immunizing from seizure articles of only evidentiary value has been the subject of vigorous debate, we do not feel at liberty to abandon a doctrine so firmly established in the Supreme Court decisions.[12] It may be thought timely to expose the doctrine to re-examination and reinterpretation, with a view to formulating sufficiently flexible guidelines without endangering constitutional protections. However, unless the Court sees fit to depart from its oft reiterated position, the judges of subordinate courts are obligated to adhere to it.

[fol. 45] For the reasons outlined, the order of the District Court must be reversed and the case remanded with directions to grant the writ of habeas corpus and discharge the petitioner unless the state will retry him within a reasonable time.

Reversed and remanded.

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[12] The impropriety of seizing and putting in evidence items of only evidential value traces back to Boyd v. United States, 116 U.S. 616 (1886).

ALBERT V. BRYAN, Circuit Judge, dissenting:

Because the District Judge's conclusions are for me irrefutable, I cannot join in overturning his decision, notwithstanding the trenchancy of the majority opinion. I find altogether untenable, in the circumstances here, its determinative basis: that the truck driver's jacket and trousers worn by the petitioner Hayden when he committed the robbery were unlawfully *seized* because they were "of evidential value only", and so not admissible at his trial.

The evidential rule of search and seizure has been sustained in other situations but it is inapposite in the setting of this case. The preliminary facts, unquestioned now, were stated by the District Judge as follows:

> "On or before March 16, 1962, a man named Miller delivered to Hayden a sawed-off shotgun and a P .38 Luger pistol, and Hayden acquired through Miller or otherwise some ammunition (sic) for both weapons. About 8 a.m. on March 17, armed with the pistol and [fol. 46] perhaps also with the gun, Hayden struck Charles E. McGuirk on the head with the pistol and robbed him of some $363, which he had just obtained from the cashier's cage of the Diamond Cab Company. Two cab drivers saw Hayden running from the scene of the crime, looking back over his shoulder; they gave the alarm, and both of them *followed him several blocks to his home at 2111 Koko Lane, which one of the drivers saw him enter.* The Diamond Cab dispatcher reported to the police what he had learned from the victim and what he had learned over the radio from one of the cab drivers. This information was relayed over the police radio to a number of patrol cars, which came to Koko Lane promptly, some in less than five minutes after Hayden had entered the house. One of the cab drivers, who had parked at the corner nearest 2111 Koko Lane, pointed out to the officers the house which Hayden had entered; the officers knocked at the

> door, which was opened by Mrs. Hayden; they told her that they were looking for a robber who was reported to have entered the house, and said they would like to speak to her husband and search the house. She offered no objection. . . ." (Accent added).

As the validity of the officers' entry and search of the house are uncontested and uncontestable, the pivot of the present decision is the *seizure* of the clothing. Hayden ran home to escape "hot" pursuit by persons who had been at the scene of the robbery and saw him go in the house. They were dutifully and lawfully attempting to apprehend him. While the police were not initially in the chase, they joined while it was still in full cry. Had they collared Hayden before he crossed his threshold, or afterwards but before he [fol. 47] undressed, the clothes he wore could unquestionably have been introduced in evidence as identification or for other purposes. Robinson v. United States, 283 F.2d 508 (D.C. Cir. 1960). How these articles were instantaneously immunized by his disrobement is unclear to me.

These garments were clues to the whereabouts of the robber. The officers did not know Hayden but they knew his attire. In fresh pursuit, they knew that the robber had sought asylum in the house; they did not know the refuge was his home. As the fugitive was not in sight on their entry, they were obliged to undertake a manhunt throughout the house. The seizure of the clothing occurred in the *hue and hunt* for the felon, as well as for the money, the pistol and the shotgun.

Obviously he was using his home as a hideout. Not until *after* the search of the cellar or basement for the felon, when the clothing was found; *was or could* Hayden be accused. Not until then were the police assured that no other man was in the house. On this point, the District Judge found:

> "Hayden was feigning sleep in the back room on the *second* floor. Two or three officers roused and ques-

tioned him, and *when the officers who were searching the first floor and the cellar reported that no other man was in the house,* they arrested him. At about the same time one of the officers noticed that the toilet in the adjoining bathroom was running continuously, and found the shotgun and pistol immersed in the flush tank. The officers found a clip of ammunition for the pistol, a sweater and a cap under the mattress of [fol. 48] Hayden's bed, and ammunition for the shotgun in a bureau drawer in Hayden's room. Meanwhile, the officer who was searching the cellar for a man or the money found a *jacket and trousers of the type the fleeing man was said to have worn, with a leather belt still in place,* in a washing machine." (Accent added.)

While this finding conclusively demonstrates that the arrest was not made until *after* the seizure of the clothes, the relative times of the two incidents are not critical. The important fact is that the seizure was made in tracking the felon and not in collecting evidence, the basis of the precept the majority would enforce. No authority is cited holding that an article seized *in a hunt* for a criminal is inadmissible because it is "of evidential value only". Nor is the item rendered untouchable because found in a quest in the quarry's home.

Again, Hayden's discard and concealment of the habit in which he had been observed on the street were as indicative of guilt as was his flight. The secreting of himself in the house anywhere—in basement, attic, bedroom, closet or on the roof—would be provable as incriminating conduct. Had he donned a different garb or disguised himself to avoid capture, the dissemblance would certainly be open to proof at trial. The proof would include production of the clothes he hid as well as those in which he reappeared.

Deceptions frequently speak as forcefully as words, and surely whatever a fugitive said to mislead the officer is fair evidence against him. Simply because the conduct or words

occur in the accused's home does not bar their admission. [fol. 49] Devices and designs to thwart arrest or conviction have never, to my knowledge, been excluded as evidence against the schemer.

Finally, and most important, the clothing was seizable as something used in the commission of the crime, concededly a recognized exception to the rule against seizure of evidence only. Pretending to be asleep, Hayden when finally discovered was undressed and abed. Assuredly, his purpose was to show that he was not equipped to commit a crime at the cab terminal only a few minutes before and several city blocks away. He thus made the issue of whether the apparel in which he had been seen was an aid—a means or an instrument—in his criminal act.

Examples of personal effects converted into implements of crime would be eyeglasses worn by an accused when he committed a crime, but not found on apprehension and without which he later demonstrates he cannot see; or artificial limbs worn at the time, but later hidden and without which he cannot walk or handle a weapon. This was virtually the reasoning in United States v. Guido, 251 F2d 1, 3 (7 Cir. 1958), cert. den. 356 US 950, treating shoes as an instrument of the crime.

This is in no sense to declare clothes qua clothes to be tools of crime. Here, to repeat, they were put in this category by the accused's reliance on his near-nudeness to eliminate himself as the robbery suspect. They are not merely proof of identification. They establish his preparedness to perpetrate the offense; they belie his alibi.

[fol. 50] If nakedness can be thus employed to raise a reasonable doubt of guilt, surely it can be refuted by the clothes he wore when he robbed and ran. If not, then to impede identification a criminal need only strip immediately he is inside his front door. Indeed, under the ruling of the Court, he need not bother to hide his clothes. Left plainly visible, they still would not be touchable for they would be of "evidential value only."

I cannot agree to Hayden's release or re-trial simply because his clothes were admitted in evidence.

[fol. 51] HAYNSWORTH, Chief Judge:

I join my brothers in an order denying a petition for rehearing en banc, but I take advantage of the occasion for a word of explanation.

The question in this case has been the subject of extended debate within the court. Judge Bell and I were not members of the panel that originally heard it, but we have participated actively in the discussion. As a result, it is apparent that a majority of the court is of the view that we are bound to apply the "mere evidence" rule because of the broad language employed by the Supreme Court in those opinions holding that private papers which could not have been classed as instruments of the crime are not subject to seizure.

Nevertheless, I think that the language the Supreme Court has employed must be read in the light of what it has held. Neither in what it has held nor in what it has said can I find an inexorable command that we hold inadmissible these articles reasonably seized in the course of a reasonable search.

[fol. 52] The Fourth Amendment prohibits only those seizures that are unreasonable, as it prohibits only those searches that are unreasonable. It is one thing to say that a seizure of a diary containing incriminating entries is unreasonable as is a search having as its objective the discovery and the seizure of such a document. Each is prohibited by the Fourth and Fourteenth Amendments. It is quite another thing to say, however, that tangible articles discovered in the course of a reasonable search have the sanctity of private papers if they cannot be readily classified as instruments or fruits of the crime. An accused's cap on his head or his shoe on his foot has no such sanctity, and, in my view, such articles acquire none when removed

from his person and placed in his closet. If the shoe is useful in comparison with the footprint which the culprit left when he fled the scene of the crime, or if a cap is useful in resolving the uncertainties of visual identification, neither should have an immunity from seizure when discovered in the course of a reasonable and lawful search.

With the amendment's proscription of unreasonable searches and unreasonable seizures in mind, I can find nothing in what the Supreme Court has done and said which requires the rejection from evidence of these articles of clothing reasonably seized in the course of a search, which, concededly, was reasonable and lawful. We are not instructed to apply the underlying rule of reasonableness in an unreasonable manner.

As the standards for the admission of confessions are undergoing a continuing process of stiffening, the police are admonished to place greater dependence upon their resources for scientific investigation. Make an impression [fol. 53] of the footprint discovered at the scene, they are told, and be prepared to make extensive laboratory analyses of the dried blood on the shirt. Such investigatory procedures will be of little use, however, unless investigators are afforded a reasonable opportunity to obtain possession of the shoe for comparison with the impression and of the bloody shirt for laboratory analysis.

I find nothing unreasonable in the majority's preference that the Supreme Court deal with the matter, but, until it does so explicitly, I think subordinate courts are free to declare seizures of articles such as these to be reasonable and not unconstitutional. Merely because of difficulty in stretching the term "instruments of the crime" to encompass them, I do not think they are immune from reasonable seizure in the course of a lawful search. The fact that articles are incriminatory has never in itself been an objection to their seizure.

A majority of the court, however, is of the view that we may not consider the question unsettled. Since, informally,

the entire court has thoroughly canvassed our freedom to follow our own notions, it is most unlikely that a rehearing en banc would serve any useful purpose whatever. It is for that reason that I join in the order denying the petition.

[fol. 55]

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 10,061.

BENNIE JOE HAYDEN, Appellant,

vs.

WARDEN, MARYLAND PENITENTIARY, Appellee.

Appeal from the United States District Court for the ..... District of Maryland.

JUDGMENT—April 21, 1966

This cause came on to be heard on the record from the United States District Court for the ..... District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings consistent with the opinion of the Court filed herein.

Simon E. Sobeloff, United States Circuit Judge.

[File endorsement omitted]

[fol. 64]

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 10,061

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—June 3, 1966

The court, having fully considered appellee's petition for rehearing en banc, hereby denies the same.

Clement F. Haynsworth, Jr., Chief Judge, Fourth Circuit;

Simon E. Sobeloff, United States Circuit Judge;

Herbert S. Boreman, United States Circuit Judge;

Albert V. Bryan, United States Circuit Judge;

J. Spencer Bell, United States Circuit Judge.

[File endorsement omitted]

[fol. 73] Clerk's Certificate (omitted in printing).

[fol. 74]

SUPREME COURT OF THE UNITED STATES

No. 480—October Term, 1966

WARDEN, MARYLAND PENITENTIARY, Petitioner,

v.

BENNIE JOE HAYDEN.

ORDER ALLOWING CERTIORARI—November 7, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.